me Court of the United States

TERM 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

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rit of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 339-69

MELVIN CARTER

v.

JOHN R. CARLSON, ERNEST J. PRETE, JOHN B. LAYTON, THE DISTRICT OF COLUMBIA

CIVIL DOCKET

DATE	PROCEEDINGS
1969	
Feb 12	Complaint, appearance Jury Demand filed
• •	• • • • • • • • • •
Mar 6	Motion of deft. #4 to dismiss complaint; c/m 3-6; P&A; M.C.; appearance of Charles T. Duncan, John A. Earnest and Madison McCulloch. filed
• •	• • • • • • • • • •
Mar 17	Motion of pltf. to amend complaint; P&A; c/m 3-13; M.C. filed
• •	• • • • • • • • • •
Apr 17	Order amending complaint, paragraph 3. (N) McGuire, J.
Apr 25	Order granting motion of deft., District of Columbia, to dismiss complaint. (N) McGuire, J.

DATE	PROCEEDINGS
• • • • • • • • • •	
May 15	Order granting motion to dismiss complaint as to deft., District of Columbia; judgment for deft, District of Columbia vs. pltf. Melvin Carter. (N) McGuire, J.
May 27	Notice of appeal of pltf, from order of 5-15; deposit by Kaplan $5.00 (copy mailed to Madison McCulloch). filed
• • • • • • • • • •	
1970	
June 19	Amended complaint; c/m 6-19 filed
• • • • • • • • • •	

[Filed February 12, 1969]

COMPLAINT AND DEMAND FOR JURY TRIAL
(Assault and Battery; Deprivation of Civil Rights; Negligence)

1. Plaintiff is a resident of the District of Columbia; the defendants are residents of and/or are found in the District of Columbia; and the actions complained of herein occurred in the District of Columbia. The amount of controversy exceeds $10,000.00, exclusive of interest and costs. Jurisdiction of this Court is invoked under D.C. Code Sec.11-521 and 11-102, and under the Civil Rights Act of 1871, 42 U.S. Code Sec.1983, and under the Judicial Code, 28 U.S. Code, Sec. 1343.

2. At all times relevant to this action, defendant John R. Carlson was employed by and acting as a police officer of

the Metropolitan Police Department of the defendant District of Columbia, and subject to the control and supervision of the other defendants; defendant Ernest J. Prete was a Captain of the Metropolitan Police Department in charge of the Ninth Police Precinct to which defendant Carlson was assigned; and defendant John B. Layton was Chief of the Metropolitan Police Department. Defendants Prete and Layton and the District of Columbia were under a duty to train, instruct, supervise and control defendant Carlson in the performance of his duties as a police officer.

3. On or about August 19, 1968, the defendant Carlson, in a restaurant known as "Paula's Cafe" located at 1427 H Street, N.E., in the District of Columbia, acting under color of law and in his capacity as a police officer, and misusing his authority, with full knowledge that his actions were wrongful, without justification and unlawful, did violently seize and punch plaintiff, and did for some time continue to punch plaintiff in and about the face, using brass knuckles, and while plaintiff was being physically restrained by two other police officers.

4. Plaintiff alleges in the alternative that the actions of defedant Carlson set forth in Paragraph 3. were negligent.

5. Defendants Prete, Layton and the District of Columbia negligently failed in their duty to train, instruct, supervise and control defendant Carlson in the proper performance of his duties as a police officer of the Metropolitan Police Department of the District of Columbia, and, specifically, negligently failed to train, instruct, supervise and control defendant Carlson:

(a) In dealing with suspected disorderly persons;
(b) In the circumstances under which a police officer should or should not make an arrest; and
(c) In the circumstances and methods by which a police officer is authorized to use force in making an arrest.

6. As a proximate result of the unlawful, wrongful and malicious, or, in the alternative, negligent actions of defendant Carlson, and as a proximate result of the negligent failures of the other defendants to perform their duties, all described in this complaint, the plaintiff sustained physical injury, pain, suffering, mental anguish, humiliation, and deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States; and the plaintiff suffered a loss of earnings and expenses.

WHEREFORE, the plaintiff demands judgment in the amount of $5,000.00 as compensatory damages, and $10,000.00 as exemplary damages.

Plaintiff requests trial by jury on all issues.

• • • • • • • • • •

[Filed March 6, 1969]

MOTION OF DEFENDANT DISTRICT OF COLUMBIA TO DISMISS THE COMPLAINT

The defendant District of Columbia moves the Court to dismiss the complaint on the following grounds:

1. The complaint fails to state a claim against this defendant upon which relief can be granted.

2. In the maintenance of a police department, the District of Columbia is engaged in the performance of a governmental function and, therefore, it is not liable for negligence which may occur during the performance of said function.

[Filed March 17, 1969]

MOTION TO AMEND COMPLAINT

The plaintiff, Melvin Carter, moves for leave to amend his Complaint, by adding the following language at the end of paragraph 3. thereof:

"..., and without justification or probable cause, arrested the plaintiff."

[Filed April 17, 1969]

ORDER

Upon consideration of the motion of plaintiff, Melvin Carter, to amend the complaint herein, and the points and authorities filed in support thereof, and no opposition having been filed thereto, it is, by the Court, this 17th day of April, 1969,

ORDERED, that the complaint herein be amended so as to include the following language at the end of paragraph 3. thereof, to wit:

"..., and without justification or probable cause arrested the plaintiff."

/s/ MATTHEW F. MCGUIRE
Judge

. . . . . .

[Filed April 25, 1969]

ORDER

Upon consideration of the motion of Defendant District of Columbia to dismiss the complaint, of the points and authorities filed in support thereof and in opposition thereto, and of oral argument by and on behalf of the parties in open court, it is, by the court, this 25th day of April, 1969,

ORDERED: That the motion to dismiss the complaint be, and the same is, hereby granted.

/s/ MATTHEW F. McGUIRE
Judge

. . . . . .

[Filed May 15, 1969]

ORDER

The plaintiff, Melvin Carter, moves the Court to revise the Order of April 25, 1969, dismissing this action as to the defendant, District of Columbia, to read as follows:

ORDERED, that the motion to dismiss the complaint be, and the same is, hereby granted, and there being no just reason for delay, the Clerk is hereby directed to enter final judgment for the said defendant.

/s/ MATTHEW F. McGUIRE
Judge

. . . . . .

[Filed June 19, 1970]

AMENDMENT OF COMPLAINT

The plaintiff, Melvin Carter, hereby amends his complaint by deleting paragraph 5 and by substituting therefore the following paragraph 5:

"5. . . .defendants Prete and Layton and the District of Columbia negligently failed in their duty to a) train and instruct defendant Carlson in the proper performance of his duties as a police officer of the Metropolitan Police Department of the District of Columbia, and, specifically, negligently failed to instruct and train defendant Carlson:

1) in how to deal with suspected disorderly persons;

2) in the circumstances under which a police officer should or should not make an arrest;

3) in the manner in which and techniques by which an arrest should be made;

4) to abstain from the use of such dangerous and unauthorized weapons as brass knuckles;

5) to abstain from using unnecessary force in arresting unarmed persons; and

b) to supervise and control defendant Carlson in the proper performance of his duties as a police officer, and, specifically, negligently failed to supervise and control defendant Carlson:

1) against using unnecessary force and violence in making arrests, although said defendants knew or in the exercise of reasonable care would have known that defendant Carlson was prone to use such force;

2) against using brass knuckles to strike persons being placed under arrest, although said defendants knew or by the exercise of reasonable care would have known that defendant Carlson was prone to such use."

The opinion of the Court of Appeals is contained in Appendix A to the certiorari petition. The judgment of that Court is contained in Appendix C to the certiorari petition.

Supreme Court of the United States

No. 71-564 ~~, October Term, 19~~

District of Columbia,

Petitioner,

v.

Melvin Carter

ORDER ALLOWING CERTIORARI. Filed January 10 -------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner District of Columbia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on July 23, 1971.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not yet been reported and is set forth in Appendix A at pages 1a through 31a. The District Court rendered no opinion, but its order dismissing the complaint against the District of Columbia set forth in Appendix B at page 1b.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 23, 1971 (Appendix C). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Whether the District of Columbia, as a congressionally created municipal corporation, is a "person" within the meaning of 42 U. S. C. § 1983.

STATUTE INVOLVED

42 U. S. C. § 1983. Civil Action for Deprivation of rights.

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

STATEMENT OF THE CASE

In a complaint filed in a civil action in the United States District Court for the District of Columbia, respondent asserted that in 1968 he was assaulted by a Metropolitan Police officer who, without probable cause, beat him with brass knuckles while he was held by two other officers. Respondent further alleged that the officer's precinct captain, the Chief of Police and the District of Columbia each negligently failed to train, instruct, supervise and control the officer with regard to the circumstances in which (1) an arrest may be made, and (2) various degrees of force may be used in making an arrest.

Respondent sought to hold the officer liable for assault and battery, or for negligence in making an arrest. He sought to hold the precinct captain and Chief of Police liable for negligence in failing to give the officer training and supervision. Finally, he sought to hold the District of Columbia liable either for its own negligence in failing to train and supervise the officer, or for the torts of the officer, the precinct captain, and the Chief of Police on a theory of *respondeat superior*. In each case, respondent asserted both a common law theory of tort liability, and an action for deprivation of civil rights under 42 U. S. C. § 1983. The police officer was never found for service of process. The precinct captain and Chief of Police moved to dismiss the complaint on the grounds that it failed to state any basis for relief, and that they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim and also on the ground of sovereign immunity. The District Court subsequently dismissed the complaint as to all defendants.

On July 23, 1971, a division of the United States Court of Appeals for the District of Columbia Circuit reversed the rulings of the District Court. Respecting the District's asserted tort liability, the court held that, although a municipal corporation, the District was nonetheless a "person" amenable to respondent's action for damages under 42 U. S. C. § 1983. The court also held that the District could not escape liability under the doctrine of sovereign immunity, even though the United States would be immune from liability under similar circumstances under the Federal Tort Claims Act, 42 U. S. C. § 2680(h).[1]

[1] The same question, i.e., whether the policy considerations articulated in that Act preclude the subjection of the District to a tort liability wider in scope than that of the United States, is currently awaiting decision in the District of Columbia Court of Appeals in *Graves* v. *District of Columbia*, D. C. App. No. 5086. Under the recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 et seq., that appellate tribunal is now "the highest court of the District of Columbia." 84 Stat. 475.

On August 6, 1971, the District of Columbia filed in the United States Court of Appeals for the District of Columbia Circuit a suggestion for rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure.[1] The suggestion for rehearing en banc was denied on October 15, 1971.

REASONS FOR GRANTING THE WRIT

In ruling in respondent's favor, the United States Court of Appeals for the District of Columbia Circuit held that a municipality, and hence the District of Columbia, is a "person" within the meaning of 42 U. S. C. § 1983, to the extent that the municipality is without immunity from suit under local law. (Appendix A 19, 20.) Because the Court was of the view that the District of Columbia in this case is not immune from suit under an evolving concept of sovereign immunity,[2] it concluded that the District is a "person" within the meaning of 42 U. S. C. § 1983 and therefore amenable to suit for damages thereunder. This ruling cannot be squared with a controlling precedent of this Court and with many subsequent decisions of lower federal tribunals which have construed and applied this Court's rationale.

In *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court explicitly rejected the notion that a municipality is a person within the purview of 42 U. S. C. § 1983. In so doing, the Court reviewed pertinent legislative history and specifically noted the defeat of a proposed amendment which would have required municipalities to respond in damages in action like that involved here. 365 U. S. at 188-191. If, as the circuit court of appeals held, *Monroe* stands for the proposition that municipalities are exempt from suit under § 1983 only to the

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[1] No challenge was made to the rulings of the division applicable to any party other than the District of Columbia.

[2] Cf. *Spencer* v. *General Hospital of the District of Columbia*, 138 U. S. App. D. C. 48, 425 F. 2d 479 (1969).

that they are independently protected by the doctrine of sovereign immunity, it is inconceivable that this Court would not have qualified its holding accordingly. Indeed, the obvious circumstance that municipalities were subject to suit in many areas at the time *Monroe* was decided persuasively indicates that this Court gave § 1983 a construction designed to impose an across-the-board rule of municipal non-liability. And in numerous post-*Monroe* decisions, lower federal courts have held that the exemption recognized in that case is applicable to governmental entities in general, whether federal, state, or local in nature. See, for example, *Accardi* v. *United States,* 435 F. 2d 1239, 1241 (3rd Cir., 1970); *United States ex rel. Gittlemacker* v. *County of Philadelphia,* 413 F. 2d 84, 86 (3rd Cir., 1969); *Dodd* v. *Spokane County, Washington,* 393 F. 2d 330, 334 (9th Cir., 1968); *Bennett* v. *Granville,* 323 F. Supp. 203 (D. Md., 1971), and cases cited at 211; *Tao Baja Development Corp.* v. *Garcia Santiago,* 312 F. Supp. 899 (D. Puerto Rico, 1970), and cases cited at 903. See also Note: *Civil Rights - School Officials Not Persons For Purposes of Section 1983, Regardless of Relief Sought,* 24 Southwestern L. J. 360 at 362 (1970); Comment, *Injunctive Relief Against Municipalities Under Section 1983,* 119 U. Pa. L. Rev. 389 at 390 (1970). Consequently, whether the District be viewed as a municipality (*Metropolitan R. Co.* v. *District of Columbia,* 132 U. S. 1 (1889)), or as an agency of the United States in the sense that it has been created by Congress to perform congressionally assigned duties of a local nature (cf. *Penn Bridge Co.* v. *United States,* 29 App. D. C. 452, 457 (1907)), it is clearly not a "person" within the meaning of § 1983, *supra.*

Furthermore, the thesis of the circuit court of appeals that § 1983 applies to municipalities if they are not immune from suit under the doctrine of sovereign immunity cannot be squared with a recent decision of the Ninth Circuit Court of Appeals which holds that the *Monroe* rationale does not cease to be applicable where the governmental

unit involved may be compelled to respond in damages under the laws of the state in which it is located. See *Brown* v. *Town of Caliente*, 392 F. 2d 546 (9th Cir., 1968). See also *Patrum* v. *City of Greensburg*, 419 F. 2d 1300, 1302 (6th Cir., 1969); *Wilcher* v. *Gain*, 311 F. Supp. 754 (N. D. Cal., 1970). Such a plain conflict in the recent decisions of two circuit courts of appeals manifestly provides additional reason for the invocation of this Court's certiorari jurisdiction, even apart from the apparent conflict of the ruling below with this Court's ruling in *Monroe*.

It is true, as the circuit court of appeals recognized, that, at the time the action was filed, respondent was entitled to proceed against petitioner in the United States District Court for the District of Columbia on a common-law theory, in addition to invoking the Court's jurisdiction under 42 U. S. C. § 1983. But the recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, *supra*, is designed to transfer to the District of Columbia Superior Court jurisdiction over local actions based on the former theory. See 84 Stat. 484-485. If the decision below is allowed to stand, however, respondent and many others may continue to seek damages against the District in the United States District Court for the District of Columbia Circuit in myriad types of civil rights actions under 42 U. S. C. § 1983. In addition, the decision below will afford clear precedent to those seeking to involve other municipalities (to the extent that they lack immunity from suit) in civil rights actions for damages in other federal courts contrary to the essential thrust of this Court's ruling in *Monroe* v. *Pape*, *supra*.

Clearly, therefore, the novel and highly questionable ruling of the United States Court of Appeals for the District of Columbia Circuit that the District of Columbia is a "person" within the purview of 42 U. S. C. § 1983 is of sufficient importance to warrant review by this court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the severe adverse impact of the ruling in the instant case upon the administration of justice in the District of Columbia, its potential impact elsewhere and its clear conflict with a holding of this Court as well as with holdings of a host of lower federal tribunals fully warrant, indeed compel, review by the Supreme Court of the United States. The petition for writ of certiorari should, accordingly, be granted.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-514

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,225

MELVIN CARTER, APPELLANT

v.

JOHN R. CARLSON, ET AL.

Appeal from the United States District Court for the District of Columbia

---

Decided July 23, 1971

Mr. Warren K. Kaplan for appellant.

Mr. David P. Sutton, Assistant Corporation Counsel, for appellees. *Messrs. Hubert B. Pair*, Acting Corporation Counsel, *Richard W. Barton* and *Ted D. Kuemmerling*, Assistant Corporation Counsel, entered appearances for appellees.

Before: BAZELON, *Chief Judge*, ROBINSON, *Circuit Judge*, and NICHOLS*, *Judge*, United States Court of Claims.

Opinion filed by BAZELON, *Chief Judge*.

Concurring opinion filed by NICHOLS, *Judge*, U.S. Court of Claims.

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* Sitting by designation pursuant to Title 28 U.S. Code, Section 293 (a).

BAZELON, *Chief Judge*: This is an appeal from the dismissal of a complaint which raises several important questions concerning the remedies for the torts of a police officer. For the purpose of testing the sufficiency of the complaint, the court must of course accept the allegations as true.[1]

The complaint alleged that in 1968 one police officer Carlson arrested appellant Carter without probable cause in a bar and, as Carter was being held by two other officers, proceeded to beat him with brass knuckles. The complaint further alleged that Carlson's precinct captain, and the Chief of Police, and the District of Columbia each negligently failed to train, instruct, supervise, and control Carlson with regard to the circumstances in which (1) an arrest may be made, and (2) various degrees of force may be used in making an arrest.

Carter sought to hold Carlson liable for assault and battery, or for negligence in making an arrest. He sought to hold precinct captain Prete and Police Chief Layton liable for negligence in failing to give Carlson adequate training and supervision. Finally, he sought to hold the District of Columbia liable either for its own negligence in failing to train and supervise Carlson, or for the torts of Carlson, Prete, and Layton on a theory of *respondeat superior*. In each case, he asserted both a common law tort theory of liability, and an action for deprivation of civil rights under 42 U.S.C. § 1983.

Officer Carlson was never found for service of process. Captain Prete and Chief Layton moved to dismiss the complaint on the ground that it failed to state a claim for which relief can be granted. Their supporting memorandum ar-

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[1] Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 172 (1967); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 481 (1947); 2A J. MOORE, FEDERAL PRACTICE § 12.08 (1968).

[illegible] that no tort on their part had been alleged, and that in any event they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim, and also on the ground of sovereign immunity. The district court dismissed the complaint against all defendants without explanation.

The common law liability of the individual officers and of the District for police misconduct is similar in many respects to their liability under § 1983, but the two theories of liability are by no means coextensive. The federal statute provides:[1]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

When a police officer makes an arrest without probable cause or uses excessive force in making an arrest, his action is sufficiently cloaked with official authority to satisfy the limitation of the statute to wrongs performed under color of law.[2] Such conduct invades an interest ordinarily protected both by the common law of torts, and by the Constitutional guarantee against unreasonable

---

[1] Civil Rights Act of 1871, § 1, R.S. § 1979, 42 U.S.C. § 1983 (1964).

[2] Monroe v. Pape, 365 U.S. 167 (1961); *see* Pierson v. Ray, 386 U.S. 547 (1967); Screws v. United States, 325 U.S. 91, 111 (1945). Acts under color of the law of the District of Columbia are under color of the law of a "State or Territory" for the purpose of § 1983. Hurd v. Hodge, 334 U.S. 24, 31 (1948); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

searches and seizures. The common law, however, may create immunities that do not apply to an action under § 1983. Conversely, the developing law of torts may extend potential liability to some defendants beyond the reach of the federal statute. Accordingly, for each ground of liability asserted in the complaint, it will be necessary to consider separately the relevant principles at common law and under § 1983.

I. The Individual Officers

We start with the premise that a government officer, like any other person, is liable at common law for his torts, even if they are committed within the scope of his employment.[4] A government officer, however, is protected by the doctrine of official immunity if the alleged tort was committed in the performance of a "discretionary" rather than a "ministerial" function.[5]

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[4] *See* K. Davis, Administrative Law Treatise § 26.02 (1958, Supp. 1970); Restatement (Second) of Agency § 343 (1958).

[5] Barr v. Matteo, 360 U.S. 564 (1959); David v. Colen, 132 U.S.App.D.C. 333, 407 F.2d 1268 (1969). While many jurisdictions recognize official immunity only for negligence, others extend immunity to malicious acts as well, so long as they fall within the general scope of a discretionary function. *Compare, e.g.*, Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, 31 N.J. 124, 140, 155 A.2d 536, 545 (1959) (immunity limited to negligence) *with* Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961) (immunity for malice). The immunity of federal officers is governed by federal common law, Howard v. Lyons, 360 U.S. 593, 597 (1959), and extends to malicious as well as negligent acts, *Barr v. Matteo, supra*.

It is not clear whether the District of Columbia follows the federal rule. The courts have not expressly distinguished officers of the District of Columbia from federal officers for purposes of official immunity. *See, e.g.*, Fortier v. Hobby, 105 U.S. App.D.C. 6, 262 F.2d 924 (1959) (federal and local welfare of-

distinction between discretionary and ministerial in this context must be drawn primarily with ref- to its purpose. Official immunity, like the related of sovereign immunity,[6] is designed to protect nt officers from the inhibiting fear of damage and the time-consuming duty to defend them; its is to encourage "fearless, vigorous, and effective tration of the policies of government." *Barr v.* 360 U.S. 564, 571 (1959). Accordingly, in determin- whether a particular government function falls within of official immunity, it does not suffice to con- simply whether the officer has "discretion" in the that he exercises judgment in choosing among al- courses of action. The proper approach is to the precise function at issue, and to determine an officer is likely to be unduly inhibited in the nce of that function by the threat of liability ious conduct.[7]

Laughlin v. Garnett, 78 U.S.App.D.C. 194, 138 F.2d 1943), *cert. denied*, 322 U.S. 738 (1944) (federal prose- local police officer). Nevertheless, it appears that the District, unlike federal officers, may lose their when there are allegations of malice. Gager v. 112 U.S.App.D.C. 135, 139-40, 300 F.2d 727, (dictum), *cert. denied*, 370 U.S. 959 (1962). In this course, there are no allegations of malice on the part supervisory officers; and Officer Carlson, whose duties ministerial, lacks immunity in any event. Consequently, distinction between the immunity of federal officers and local officers would seem to be irrelevant for present

12 *infra*.

approach to the problem of discretion and immunity elaborated by the California Supreme Court in a opinion, in the case of Johnson v. State, 69 Cal.2d P.2d 852, 73 Cal. Rptr. 240 (1968). We agree with

Under this standard, it is clear that an action could be maintained against Officer Carlson at common law for the conduct alleged in the complaint. An arrest without probable cause constitutes a tort at common law, as does the use of excessive force to make an arrest.[8] And the law is clear that an arresting officer has no immunity from suit for torts committed in the course of making an arrest.[9]

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that court in refusing "to enmesh ourselves deeply in the semantic thicket of attempting to determine, as a purely literal matter, 'where the ministerial and imperative duties end and the discretionary powers begin.'" *Id.* at ——, 447 P.2d at 357, 73 Cal. Rptr. at 245, *quoting* Ham v. County of Los Angeles, 46 Cal. App. 143, 162, 189 P. 462, 468 (1920). Instead we think the inquiry should be guided by the underlying purposes of the immunity doctrine. We have already adopted essentially this approach to the immunity of government units, *see* Spencer v. General Hospital, 138 U.S.App.D.C. 48, 425 F.2d 479 (1969) (*en banc*); Graham v. District of Columbia, —— U.S.App.D.C. ——, 433 F.2d 536 (1970). It is equally appropriate when the issue is the immunity of government officers.

[8] Pierson v. Ray, 386 U.S. 547 (1967); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962) (*en banc*); Craig v. Cox, 171 A.2d 259 (D.C.Mun.App. 1961), *aff'd*, 304 F.2d 954 (1962); *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.03 (1958, Supp. 1970); RESTATEMENT (SECOND) OF TORTS §§ 121, 132 (1965).

[9] *See* sources cited note 8 *supra*. Official immunity does not extend to the arresting officer, despite the fact that a high degree of discretion is clearly involved in deciding when and how to make an arrest without a warrant. *See e.g.*, Sherbutte v. Marine City, 374 Mich. 48, 130 N.W.2d 920 (1964), explicitly rejecting the argument that an arrest is discretionary for the purposes of official immunity. This rule presumably reflects a long-standing judgment that the threat of damage suits does not significantly impede the effective operation of a police department, when the impediment is weighed against

Officer Carlson would likewise be subject to suit under the federal statute. An arrest without probable cause, or an arrest made with excessive force, constitutes an unreasonable seizure in violation of the Fourth Amendment. Thus the complaint alleges that Officer Carlson deprived Mr. Carter of a constitutional right, and it states a cause of action under § 1983. Like the common law, the federal statute recognizes no official immunity for the arresting officer.[11]

The arresting officer, however, is not at present a party to the litigation. Accordingly, we turn to the more difficult question of the possible liability of Carlson's superior officers. The claim against Chief Layton and Captain [illegible] is based on the allegation that they were each negligent in the exercise of duties to train, instruct, supervise and control Carlson. At this stage, of course, we have no way of knowing the extent, if any, to which such duties

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interest in a tort remedy for police misconduct. *See* [illegible] *Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-19 (1963).

While the arresting officer has no immunity, he may nevertheless assert, as a defense on the merits, that he made the arrest in good faith, with probable cause, under a statute which he reasonably believed to be valid. Pierson v. Ray, 386 U.S. 547, 555-58.

Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962) (*en banc*). Indeed, it now appears that wholly apart from statutory remedies, the Fourth Amendment itself gives rise to a federal cause of action for damages consequent upon an unconstitutional arrest or search, at least where the violation is committed by a federal officer. Bivens v. Unknown Named Agents, 39 U.S.L.W. 4821 (U.S. June [illegible]).

[illegible] cases cited note 10 *supra*.

may have rested upon them instead of others. Likewise, we cannot now determine whether a breach of such duties occurred, or had any causal relationship to appellant's injuries. We are confronted only with the threshold claim that the suit is barred by the doctrine of official immunity.

In our view, even that claim cannot be resolved in this case on the basis of the bare pleadings before us. The functions of training, supervising, and controlling police officers subsume a variety of distinct duties, conceivably incumbent in some degree on a variety of police personnel. No doubt some of these duties should be regarded as discretionary for the purposes of official immunity, but others are clearly ministerial for that purpose.[12] The relevant duties of each supervisory officer in this case must be spelled out with much greater specificity before the issue of his immunity can be resolved, and procedures by which that may be done are available to both sides in this litigation. Either Chief Layton or Captain Prete will prevail in his claim of immunity if he can establish that his responsibility, if any, for the training and supervision of Officer Carlson was wholly discretionary in char-

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[12] For cases holding supervisory officers subject to suit, though not always ultimately liable on the merits for the particular transgressions involved, *see, e.g.*, Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971) (mayor, police comm'r); Roberts v. Williams, —— F.2d ——, —— (5th Cir. No. 28,822, Apr. 1, 1971) (slip op. at 6-20) (Nichols, J., sitting by designation) (prison superintendent); Sostre v. McGinnis, 442 F.2d 178, 189-90, 205 n.51, 206-07 (2d Cir. 1971) (*en banc*) (state comm'r of corrections); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *rehearing en banc granted*, June 16, 1971 (mayor, public safety comm'r, police chief, fire chief, penitentiary superintendent); Sheridan v. Williams, 333 F.2d 5 (9th Cir. 1964) (police chief); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964) (police comm'r, police chief); Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943) (city manager, police chief).

order." He may be able to establish that fact by reference to police department regulations delegating the crucial responsibility to another officer, or by means of uncontroverted affidavits in support of a motion for summary judgment.[4] Alternatively, Mr. Carter may be able to defeat one or both claims of official immunity after he has had

[3] With respect to the general duties of training and supervision it may well be that the responsibilities of Chief Layton fall within the scope of official immunity, while those of Officer Prete do not. Both officers might be brought outside the protection of that doctrine, however, if appellant can establish the allegations contained in a proposed amended complaint which he filed with this court. That proposed amendment alleges that both Prete and Layton knew, or should have known, that Carlson was likely to use excessive force in making an arrest, and in particular that he was likely to use brass knuckles. In that case, failure to take corrective action might well be negligence in the performance of a ministerial function, outside the protection of official immunity. The proposed amendment, of course, should be submitted in the first instance to the trial court on remand, to be considered in light of the liberal terms of FED. R. CIV. P. 15(a).

[4] This was the course taken in David v. Cohen, 132 U.S. App. D.C. 332, 336, 407 F.2d 1268, 1271 (1969). In that case a collection officer of the Internal Revenue Service had erroneously served a notice of levy for the payment of back taxes which had in fact already been paid. The taxpayer filed suit against, *inter alia*, the Commissioner of Internal Revenue. The Commissioner claimed official immunity, and the trial court granted his motion for summary judgment on that basis. He submitted a Treasury Regulation and an uncontroverted affidavit to establish that he had delegated to subordinate officers all direct responsibility for issuing levies. In reversing the ruling below, this court concluded that if the Commissioner was in any way negligent with respect to the matter in question, that negligence could have occurred only in the performance of his general duty to supervise the operations of the agency, a duty properly treated as discretionary and immune from suit.

the opportunity through pretrial discovery to ascertain how the relevant responsibilities are allocated within the police department, and how, if at all, they were fulfilled in this case. When the necessary factual information emerges, either officer may of course again invoke his claim of immunity;[15] in the absence of the relevant information, however, it was error to dismiss the common law claims against the officers.

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[15] *See* Graham v. District of Columbia, —— U.S.App.D.C. ——, 433 F.2d 586 (1970) (pleadings insufficient to permit resolution of claim of sovereign immunity); Kisielewski v. State, 68 N.J. Super. 253, 172 A.2d 203 (App.Div.), *pet. for certification denied*, 36 N.J. 144, 174 A.2d 927 (1961).

The author of this opinion believes that it would greatly simplify analysis to eliminate the various doctrines of immunity, and to weigh the degree of discretion required in the performance of a particular governmental function as a factor bearing solely on the ultimate question of liability. *See* Elgin v. District of Columbia, 119 U.S.App.D.C. 111, 121, 337 F.2d 152, 157 (1964) (Bazelon, C.J., concurring); *accord*, Spencer v. General Hospital, 138 U.S.App.D.C. 43, 58-59, 425 F.2d 479, 489-90 (1969) (Wright, J., concurring).

In his view the doctrine of immunity is unnecessary to protect the government officer from inappropriate substantive liability, and it is increasingly ineffective to protect him from the mere harassment of litigation. With respect to the question of ultimate liability, he believes that the substantive law of torts is sufficient to protect the officer from liability for conduct that is reasonable in the circumstances. *See, e.g.*, Roberts v. Williams, *supra* note 12, slip op. at 27-32 (county supervisors); Sostre v. McGinnis, *supra* note 12, 442 F.2d at 189-90, 205 n.51, 206-07 (state comm'r of correction); Anderson v. Nosser, *supra* note 12, 438 F.2d at 199-202 (mayor and comm'r of public safety); Orvis v. Brickman, 90 U.S.App.D.C. 262, 196 F.2d 762 (1952) (D.C. Mental Health Comm'rs, D.C. police officer). And with respect to the question of mere litigation, he questions the utility of the doctrine of immunity as a threshold screening device if, as in this case, it turns on facts that may be virtually identical to the facts that control the ul-

if Captain Prete or Chief Layton is protected by immunity from suit at common law, they are both subject to suit under § 1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights. Indeed, Mr. Justice Frankfurter maintained that § 1983 was designed for precisely such a case, *i.e.*, the case in which the State shields a police officer from liability for conduct which would subject a private citizen to liability.[16] While the Supreme Court has read into the statute immunity for legislators[17] and judges,[18] it has not read into the statute a broad common law immunity for all government officers exercising discretionary functions.[19] In particular, various supervisory officers have been held subject to suit under § 1983 for negligence in supervising their subordinates.[20]

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question of liability. As this court observed in *Graham v. District of Columbia*, *supra*: "If [the necessary particularity] is not developed until trial the defense of sovereign immunity will be closely akin to a motion for a directed verdict on the merits . . . ." —— U.S.App.D.C. at ——, 433 F.2d

In his view, that state shield of immunity is what brings the officer's conduct "under color of law" as required by [illegible]. Monroe v. Pape, 365 U.S. 167, 211, 238, 242-43, 255 (1961) (Frankfurter, J., dissenting).

Tenney v. Brandhove, 341 U.S. 367 (1951).

Pierson v. Ray, 386 U.S. 547, 553-55 (1967).

Several federal courts have held that official immunity is more limited under § 1983 and related statutes than at common law. *E.g.*, Roberts v. Williams, —— F.2d ——, —— (5th Cir. No. 28,529, Apr. 1, 1971) (slip op. at 26-27); McLaughlin v. [illegible], 398 F.2d 287, 290-91 (7th Cir. 1968); Jobson v. [illegible], 355 F.2d 129, 133-34 (2d Cir. 1966).

The cases cited note 12 *supra*. We think it clear than an action under § 1983 may be based on negligence, if that negligence leads to a constitutional deprivation. *See also* Jenkins v. [illegible], 424 F.2d 1228 (4th Cir. 1970) (Sobeloff, J.); Whirl

In *Roberts v. Williams*, the Fifth Circuit affirmed a judgment against a prison superintendent for injuries resulting from the careless use of a shotgun by a prisoner-guard, or "trusty." The superintendent's liability was based on the finding that he had negligently failed to train or supervise the guard in the safe use of the weapon. ____ F.2d ____, ____ (No. 28,829, Apr. 1, 1971) (slip opinion at 6-20). Similarly in this case appellant will be entitled to prevail if he can show that Captain Prete or Chief Layton was negligent in performing his own duty to supervise or train Officer Carlson, and that the negligence caused appellant to be deprived by Carlson of his constitutional rights. The showing may well be difficult, but if it succeeds then no local rule of immunity can bar recovery under the federal statute.

II. The District of Columbia

We turn now to appellant's claim against the government of the District of Columbia. That claim may rest on a theory of vicarious liability for the torts of the individual police officers, or on the theory that the District itself was negligent in the performance of its own duty to supervise and control police officers. In either case, the first question is whether the District is protected from suit by the doctrine of sovereign or governmental immunity.

Sovereign immunity serves essentially the same function as the distinct doctrine of official immunity discussed above. Thus it is not surprising to find that in this jurisdiction, as in others, the common law has developed the same criteria for both kinds of immunity. The District of Columbia is immune from suit only for acts committed in the exercise of discretionary functions. *Spencer v. General Hospital*, 138 U.S.App.D.C. 48, 425 F.2d 479 (1969)

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v. Kern, 407 F.2d 781, 787-89 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969).

(*en banc*). A function is discretionary under *Spencer* if it is "of such a nature as to pose threats to the quality and efficiency of government in the District if liability in tort was made the consequence of negligent act or omission." *Id.* at 51, 425 F.2d at 482. Accordingly, we must apply that standard to the conduct underlying each theory for holding the District subject to liability at common law.

Vicarious liability at common law for Carlson's conduct. The alleged tort of arresting officer Carlson is one possible basis for imposing vicarious liability on the District. We have already noted that the discretionary character of the decision to make an arrest without a warrant or to use force in doing so, does not shield the arresting officer from liability for assault, or for false arrest.[9] If the arresting officer himself is subject to suit for his tort, it is hard to conceive of any substantial additional threat to the efficiency of government that would result from subjecting the District to suit as well. Accordingly, we hold that the act of making an arrest is ministerial for the purposes of the *Spencer* doctrine of sovereign immunity.

The District urges us to limit the rule of *Spencer* to cases involving negligence, and to hold the municipal government completely immune from suit for the intentional torts of its employees.

In *Spencer* we indicated that we were influenced by the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), in adopting "discretion" as the hallmark of acts protected by sovereign immunity. 138 U.S.App.D.C. at 51 & n.7, 425 F.2d at 484 & n.7. We are now urged to follow the Act again, and to adopt a rule of immunity for intentional torts, whether discretionary or ministerial in

[9] See p. 6 n.9 *supra*.

character. *See* 28 U.S.C. § 2680(h).[22] We made it clear in *Spencer*, however, that the Act does not in any way control the character of sovereign immunity in the District of Columbia; the developing common law of the District is neither precluded from adopting principles contained in the Act, nor required to do so.

The provision of the Act asserting the immunity of the United States with respect to certain intentional torts has been subject to severe and persuasive criticism. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.08 (1958, Supp. 1970). In the absence of legislation, we see no reason to incorporate that immunity into the law of the District. When a tort is made possible only through the abuse of power granted by the government, then the government should be held accountable for the abuse, whether it is negligent or intentional in character. Accordingly, we reject the suggestion that the District is immune from suit for the intentional torts of its employees.

At one time the intentional character of Officer Carlson's alleged tort might have been a barrier to suit, not because of any quirk in the doctrine of immunity, but because many courts would not impose vicarious liability for an intentional tort.[23] Today, however, it is widely recognized that a master may be held liable for the intentional torts of his servants in appropriate circumstances. In particular, a servant authorized to make arrests ordinarily subjects his master to liability for using excessive force to make an arrest, or for making an unlawful arrest.[24] Since Officer

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[22] The FTCA exemption actually covers only certain specified torts, and not all intentional torts; it does, however, cover the torts arising out of Officer Carlson's alleged conduct.

[23] F. HARPER & F. JAMES, LAW OF TORTS § 26.9 (1956).

[24] RESTATEMENT (SECOND) OF AGENCY § 245 & comment b (1957). Of course Carlson's master for this purpose is his employer, the District, and not the supervisory officers who

was authorized by the District of Columbia to arrests, misuse of that authority, even though intended may nevertheless result in vicarious liability on part of the District.[25]

Vicarious liability at common law for the conduct of supervisory officers. The alleged negligence of Captain and Chief Layton is another possible basis for imposing vicarious liability on the District. As we have previously the present record does not disclose the precise or either officer's supervisory functions. Thus at stage it is impossible to determine whether the District is immune to suit with respect to their conduct, even as it is impossible to determine whether the officers themselves are at common law.

If it develops that either officer is subject to individual liability, then his negligence should subject the District to liability as well. That is, functions which are ministerial for the purpose of imposing liability on individual officers are also ministerial for the purpose of imposing liability on the government. For if the threat of individual liability does not impair the performance of a particular government function, then it is unlikely that the additional threat of government liability will have that effect.

If, on the other hand, it develops that the officers themselves are immune, we think that should not necessarily foreclose the question of the District's vicarious liability

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fact his fellow employees. *See* Robertson v. Sichel, 127 U.S. 507 (1888); Bowden v. Derby, 97 Me. 536, 55 A.417 (1903); Dowler v. Johnson, 225 N.Y. 39, 121 N.E. 487 (1918); HARPER & JAMES, *supra* note 23, § 29.8 at 1638-34.

[25] Because we are concerned in this case primarily with the threshold question of immunity, we do not now explore the implications of vicarious liability for intentional torts.

for their conduct.[26] With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance. If the trial court determines that this is such a case, then the officers, but not the District, will be entitled to immunity at common law.[27]

C. *Direct liability of the District for negligence at common law.* Appellant also claims that the District may be liable for its own negligence in failing adequately to super-

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[26] There is perhaps a conceptual difficulty with the notion of imposing vicarious liability on the District for the conduct of officers who are not themselves subject to liability. It is generally recognized, however, that the master can assert only the servant's substantive defenses, and not his immunity to suit. *E.g.*, Schubert v. August Schubert Wagon Co. 249 N.Y. 253, 164 N.E. 42 (1928) (servant's immunity from suit of spouse no bar to master's vicarious liability); *see* HARPER & JAMES, *supra* note 23, § 26.17.

[27] In concluding that the common law immunity of the government may sometimes be narrower in scope than the immunity of government officers, we are in accord with the views of several leading commentators. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17 (1958, Supp. 1970); 2 HARPER & JAMES, *supra* note 23, comment to § 29.10 n.3 (Supp. 1968); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 55 GEO. L.J. 889 (1966). When the California Supreme Court embarked on its pioneering effort to update the law of the immunity of governments and of officers, the court similarly concluded that the immunity of a government unit for discretionary conduct should be narrower than that of an officer. Lipman v. Brisbane Elem. School Dist., 55 Cal.2d 224, 230, 359 P.2d 465, 467 11 Cal. Rptr. 97, 99 (1961). The reasons given by the court are essentially those stated in the text, *infra*. The California Legislature subsequently rejected that approach, however, making the two immunities for the most part coextensive. Calif. Tort Claims Act of 1963, § ——, CALIF. GOV'T. CODE § 815.2(b) (West 1966).

train, and control Carlson. This claim may be superfluous if appellant can attribute to specific government officers any negligence that may have occurred, and proceed against the District on a theory of vicarious liability. The claim of direct government liability will be important, however, if no individual officer can be charged with the alleged failure of training and supervision, either because the District has never delegated to any officer the relevant supervisory functions, or because appellant is unable to discover which officer is responsible.

Here the threshold question is whether the common law imposes on the District such a duty of supervision, with potential liability in tort for its breach.[28] We think the question was correctly answered by the District Court in *Thomas v. Johnson*, 295 F.Supp. 1025, 1030-33 (D.D.C. 1969). In a carefully reasoned opinion, the court held that the District of Columbia as a corporate entity has a duty to supervise, train, and control its police officers.[29]

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[28] *Compare* Westminster Investing Corp. v. G. C. Murphy Co., —— U.S.App.D.C. ——, 434 F.2d 521 (1970) (D.C. has duty to protect citizens from riot damage, unnecessary to reach question of immunity).

[29] Commentators have long urged the recognition of a municipal duty to supervise and train police officers. *See, e.g.*, Comment, *Government Liability in Tort*, 34 YALE L. J. 229, 234 (1924); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CATH. U. L. REV. 397, 408-11 (1967).

The court in *Thomas* apparently concluded that the duty of the District was broader than that of the Mayor or the Police Chief, for the court dismissed the complaint against each of those officers and refused to dismiss the complaint against the District. While we might question the propriety of reaching that conclusion on the bare pleading, we agree that on a proper record a court might well find a breach of duty attributable directly to the government, and find further either

A breach of that duty might involve either ministerial or discretionary aspects of supervising police officers. Accordingly, a claim of negligence based on a breach of that duty cannot be dismissed at this stage on the ground of sovereign immunity.

D. *Applicability of § 1983 to claims against the District.* Finally, we reach the question of the District's possible liability under § 1983, as distinguished from its liability at common law. At first liability under the federal statute might seem to be precluded by *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961), which held that the City of Chicago was not a "person" against whom suit could be brought under § 1983. The Court found that Congress, in enacting the statute, did not intend to extend liability to municipalities.

Monroe is regularly cited for the proposition that no suit against a municipality is authorized by § 1983.[20] The language of the Court's opinion certainly seems to go that far.[21] On the facts of the case before it, however, the

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that no individual officers could properly be charged with that breach, or that the responsible officers were immune while the District was not.

[20] *See, e.g.*, Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); United States *ex rel.* Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3d Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); Wallach v. City of Pagedale, 359 F.2d 57 (8th Cir. 1966).

[21] After reviewing the legislative debates surrounding the defeat of a proposed amendment to the Civil Rights Act, the Court concluded:

> The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.

365 U.S. at 191.

Court held only that § 1983 does not authorize a suit for damages against a municipality which has been clothed in immunity by its parent state. And, as we shall see below, the legislative history underlying the decision supports an interpretation of *Monroe* that limits it to those facts.

Several federal courts have concluded that suits for injunctive relief fall outside *Monroe's* prohibition on § 1983 suits against municipalities.[23] We hold that a suit for damages from the District of Columbia, otherwise within § 1983, presents another such exception, for two independent reasons.

First, the reasoning of *Monroe* is inapplicable to the extent that local common law recognizes municipal liability. *Monroe* is based on the evidence in the legislative history that Congress intended to avoid interfering with the liability of municipal governments.[24] Municipal liability and

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[23] Garren v. City of Winston-Salem, 439 F.2d 140 (4th Cir. 1971); Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 321-23 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961); Service Employees Int'l Union v. County of Erie, 306 F.Supp. 1080 (W.D.Pa. 1969); Atkins v. City of Charlotte, 296 F.Supp. 1068 (W.D.N.C. 1969); Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 118 U. Pa. L. Rev. 389 (1970).

[24] The Court relied primarily on the vehemence of the opposition to the Sherman Amendment, which was resisted as harsh or unconstitutional or both. The constitutional basis for opposition was quoted by the Court:

> "[T]he House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State

365 U.S. at 190, *quoting* Cong. Globe, 42d Cong., 1st Sess. 804 (1871) (remarks of Representative Poland).

immunity were to be left to the exclusive control of the states. The intent of Congress was not to create municipal immunity, but to defer to the immunity that existed under local common law. Where local law has abolished or narrowed the scope of municipal immunity, the scope of immunity under § 1983 should follow the local rule.[34]

That construction of § 1983 finds additional support in a related statute, 42 U.S.C. § 1988, also enacted by a Reconstruction Congress as part of the original Civil Rights legislation.[35] § 1988 provides:

> [I]n all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law . . . of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

The Supreme Court has construed § 1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240 (1969). If local law recognizes government liability where federal common law might not, then § 1988 seems to provide that the local rule shall govern in an action under § 1983.[36]

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[34] *See* Kates, *Suing Municipalities and Other Public Entities Under the Federal Civil Rights Act*, 4 CLEARINGHOUSE REVIEW 177, 196-98 (1970).

[35] Civil Rights Act of 1866, § 3; Civil Rights Act of 1870, § 18, R.S. § 722, 42 U.S.C. § 1988 (1964).

[36] The Ninth Circuit has rejected the argument that municipal liability under § 1983 is controlled by state law. Brown v. Town of Caliente, 392 F.2d 546 (9th Cir. 1968). In that case, however, it does not appear that the relevance of § 1988 was argued.

A second reason for holding the District subject to suit under the federal statute flows from the unique character of the District of Columbia. *Monroe* reflects the fact that the Reconstruction Congress had doubts about its constitutional power to impose new liability on an ordinary municipality, which was regarded as the "mere instrumentality for the administration of state law." [37] But Congress could have had no such doubts about its power to impose liability on the District of Columbia, over which it has complete legislative jurisdiction.[38] Thus the considerations that led the *Monroe* Court to exclude ordinary municipalities from the ambit of § 1983 have no application to the District.

Accordingly, we hold that the District of Columbia may be sued under § 1983, for all three claims presented by the complaint in this case.[39] If appellant can prove that he

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[37] *See* note 33 *supra*.

[38] U.S. CONST. art. 1, § 8, cl. 17.

[39] A few courts have suggested that there can be no vicarious liability under § 1983. *See* Sanberg v. Daley, 306 F.Supp. 277 (N.D.Ill. 1969); Salazar v. Dowd, 256 F.Supp. 223 (D.Colo. 1966). The real basis for these cases, however, is that a superior officer is not subject to vicarious liability for the torts of his subordinate, whether at common law or under § 1983, because they are both servants of the same employer, *see* note 24 *supra*.

Ordinarily in a § 1983 suit the only employer is a public entity, whose liability is thought to be precluded by *Monroe*, and not by any theoretical bar to the doctrine of vicarious liability. Hill v. Toll, 320 F.Supp. 185 (E.D.Pa. 1970), presents the issue of vicarious liability with unusual clarity. The defendants in that case were, *inter alia*, a surety company that had provided the plaintiff with a bail bond, and the surety's agent, who arrested the plaintiff in connection with the bail bond contract. While the arresting agent was deemed to be acting under color of law, his employer, unlike the ordinary § 1983 employer, had no claim to governmental immunity. Consequently, the court was confronted with a

was deprived of constitutional rights by the negligence of the District, the negligence of Officers Prete or Layton, or the conduct of Officer Carlson, then he has a federal statutory right to damages from the District of Columbia.

III. Conclusion

We have concluded that the complaint in this case states facts sufficient to sustain a number of distinct causes of action against a motion to dismiss. Of these, perhaps the most promising is the claim against the District for the tort of the arresting officer. The theoretical profusion of remedies may of course be largely illusory. The obstacles to recovering in tort from an individual police officer are notorious, and the obstacles to recovering from the government are almost as great.[28] Nevertheless, until the legislature provides a substitute scheme for compensating the victims of police torts, common law principles and the federal Civil Rights Acts guarantee to people like appellant at least a day in court.

The judgment of the District Court dismissing the complaint is reversed, and the case is remanded for further proceedings on all counts.

So ordered.

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clear question of the applicability of *respondeat superior* in a suit under § 1983. The court held that § 1983 incorporates the common law doctrine of *respondeat superior*, 320 F.Supp. at 132-39, a result compelled in our view not only by the reasoning of the *Hill* court but also by 42 U.S.C. § 1986, discussed above. *Accord*, Hesselgesser v. Reilly, 440 F.2d 901 (4th Cir. 1971).

[28] *See* Wolf v. Colorado, 338 U.S. 25, 42-44 (1949) (Murphy, J., dissenting); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

Nichols, *Judge*, concurring: I join in the decision of the court in this case and in its reasoning except where it is inconsistent with the observations that follow.

The problems posed appear to be of the highest importance and not only to my colleagues on the panel, who as regular judges of the D.C. Circuit will have to live with what we say herein, but also to me as a citizen and taxpayer of the District of Columbia. I want to state my position because I am fearful that the decision we come to may wrongly be taken as just another manifestation of that deplorable hostility between bench and bar, and police, that has grown up so fast in my lifetime, and which in my view constitutes a disturbing symptom of the degeneration of our society.

First of all, as to officers Prete and Layton. The trial court apparently held they were immune from suit because of their official status, regardless of their share, if any, in the alleged wrong, and also because they were not alleged to have had a direct share in it. It seems to me we have to reverse and remand because the imputed rationale of the decision below would if followed go far to render useless and futile a major provision of the Civil Rights Act of 1871, 42 U. S. C. § 1983, quoted in this court's opinion. If state or territorial supervisory police officials (including D.C.) are to be absolutely immune from personal liability, simply by virtue of their positions, the section might as well be repealed, it would be so spotty and erratic in its application. Congress could not have intended this and this law has not done it hitherto. The police officer is such a key position as to Civil Rights, that to immunize him would deny equal justice to anyone else who might incur personal liability under § 1983. Thus I deem it necessary to follow decisions of other circuits cited by this court but apparently ignored by the court below, holding that local law rules of immunity for local officials do not

necessarily or wholly apply to them in § 1983 cases. I do not see any reason to think that in the immediate future, any such state or territorial immunity will be recognized under § 1983 in any Federal court unless in a context where its continued existence appears consistent with the purposes of § 1983.

I deem it therefore a sterile exercise to consider whether outside of § 1983, defendants Layton and Prete may be immune from suit at common law to the extent to which their now unascertained duties are held to be discretionary. Certainly § 1983 takes such *per se* immunity from them.

I do not think that a Federal officer not subject to § 1983 by its terms, and sued in tort at common law, should be held to enjoy an immunity denied his state or territorial brother simularly situated. I wish to "record a continuing belief that all police and ancillary personnel in this nation, whether state or Federal, should be subject to the same accountability under law for their conduct." See concurring opinion of Judge Bell in *Anderson v. Nosser*, 438 F. 2d 183, 205 (5th Cir. 1971), calling attention to this apparent anomaly in that circuit and referring to Judge Gewin's dissent in *Norton v. McShane*, 332 F. 2d 855, 863 (5th Cir. 1964). I think rather that § 1983 *extends* to local officials a Federal common law rule that determines primarily and of its own force the liability or immunity of Federal officials for breaches of civil rights protected by the Constitution. The existence of such a rule will no longer be denied in view of *Bivens v. Six Unknown Narcotics Agent*, U.S. 39 U.S.L.W. 4821 (June 21, 1971), although the part of it that establishes official immunities is left open, except in Mr. Justice Harlan's concurring opinion. The District of Columbia being a Federal enclave, here least of all is there any rhyme or reason for any distinction between the immunities of Federal and D.C. officials. In the state, contrariwise, the Federal system requires that Federal

courts when exercising pendent or diversity jurisdiction against any immunities of state officials against liability under state law, and this is done in *Roberts v. Williams*, [illegible] (5th Cir. 1971), where certain county officials were held absolutely immune under their own state law of torts, but only qualifiedly immune under 42 U.S.C. § 1983.

Given the necessity as we hold here, that plaintiff have his day in court, I would apply to a Constitutional claim of a similar kind against a police officer employed by any state or territory and also against any person employed in the District of Columbia or elsewhere by the Federal government and having functions remotely comparable to those of a D.C. police officer. I deem it important to emphasize that D.C. police are not second-class citizens. If there is a difference it is in fact situations not applicable here.

David v. Cohen, 132 U.S. App. D.C. 333, 407 F.2d 1268 (1968) is the leading case in this circuit on the immunity of Government officials, and properly has received careful attention in the instant case, but it confronts us with complications not easily made simple. The plaintiffs, Mr. and Mrs. David, had been delinquent Federal taxpayers. He paid the deficiencies, but a few days later the Internal Revenue Service levied on his bank account, causing their outstanding checks to be dishonored, with adverse consequences to them. Revenue agent Lynch, a defendant, issued the levies because of a mistake of fact. Both parties moved for summary judgment, and the trial court dismissed the complaint. This court affirmed. Defendant Sheldon Cohen, then Commissioner of Internal Revenue, was shown to have had no operating responsibilities in the matter of levies, delegations of authority being outstanding that vested this duty in subordinates. The court reasoned from this that Mr. Cohen could not have been personally negligent except in the exercise of supervisory

duties and any failure in that capacity would be "within the scope of his authority and in the discharge of his official duties." I read this as meaning that a person at Mr. Cohen's level could not be liable for negligence in generally managing and directing the policies and procedures of the agency, in the absence of malice towards plaintiffs, or any act specifically directed at them. A breach of duty respecting plaintiffs specifically was not possible, and any deficiency in the discretionary general management of the agency was not the proper subject of a lawsuit. It is hard to tell, however, to what extent Mr. Cohen's immunity resulted from his general status as an official of his high level, and to what extent from an analysis of the breaches of duty possible to him in that particular case. The opinion recites the need that he should do his duty unembarrassed by fear of damage suits which would consume time and energies needed for public service. This suggests that the real foundation of the immunity is status. However, agent Lynch, an official of no particular status, was held immune also, though he actually issued the offending levies. He acted under a mistake of fact, but there was no consideration whether it might have been his duty to know the facts. This issue was apparently dismissed as not relevant. It was held "he made the type of mistake of fact that is insulated by the privilege given to non-ministerial acts." "The test of whether a challenged action is ministerial or non-ministerial is not the office *per se* or its height, but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned."

The immunities of these two defendants thus appear to be of different kinds. That of Mr. Cohen results from the insulation afforded to him by delegations of authority, from responsibility for the actual operative decision that led to the injury. That of Mr. Lynch is the official's qualified immunity when he has to make a difficult discretionary

and acts under a mistake of fact. If either had been a municipal official sued under § 1983, I doubt if the result would have been different, that is, I question whether anything should properly have turned or did turn on the employer being the Federal government. It has been said that no one has a Constitutional right to be free from a police officer's honest misunderstanding of law or fact in making an arrest. *Gabbard v. Rose*, 359 F.2d 182 (6th Cir. 1966). Thus it seems there is some kind of immunity from negligence liability where the alleged negligence is failure to be informed, that covers a wide spectrum of official action. *Cf. Pierson v. Ray*, 386 U.S. 547 (1967). And we have also involved here the ancient reluctance of courts to substitute their judgment for that of executive government officials in the making of policy or managerial decisions entrusted by law to the latter persons. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

While the final adjudication of this case will require findings as to the duties of defendants Layton and Prete, as the majority hold, it may be premature to deal with this as a threshold question. I do not for myself consider I have that knowledge to assure me that they do not have the same immunity apparently allowed to Mr. Cohen, which is absolute in the absence of malice. Their duties must be known for a determination whether they breached them. I think it is at least useful and roughly accurate to describe the position of police and other municipal officials as having absolute immunity as being one of qualified immunity, under § 1983. *McLaughlin v. Tilendis*, 398 F. 2d 287 (7th Cir. 1968); *Nelson v. Knox*, 256 F. 2d 312 (6th Cir. 1958); *Cobb v. City of Malden*, 202 F. 2d 701 (1st Cir. 1953). They are not liable for executive or managerial decisions among policy alternatives, or good faith acts on mistaken fact premises, and in a negligence claim, only for a clear breach of duty that led to the injury. Thus they are not liable for honest, good-faith errors of judg-

ment, because an official who exercises his best judgment does not commit a breach of duty just because he is wrong. It might be that delegations of authority would, as in the case of Mr. Cohen, insulate the D. C. Chief of Police from the kind of decision making, as to training of patrolmen, that might generate tort liability, but I think the hurdle plaintiff must surmount is more fundamental. We might well have followed the example Chief Judge Magruder of the First Circuit set some years ago, in remanding a 42 U.S.C. § 1983 case where the lower court had erroneously allowed absolute immunity to city officials. *Cobb v. City of Malden*, 202 F. 2d at 706 (concurring). He said:

> * * *. But I think it deserves to be emphasized how unlikely it is that the plaintiffs will be able to recover judgment, upon trial of the case against the individual defendants, in view of what plaintiffs will have to prove [under the qualified immunity standard] in order to make out a cause of action in tort.

It appears to me to be a rare situation where one exercising a supervisory or managerial responsibility in Government has committed such a clear cut breach of duty that he is personally liable in spite of this qualified immunity. *Roberts v. Williams, supra*, offers an example of the failure of mere mistakes to reach that level. If plaintiff has nothing more specific against defendants Prete and Layton than he divulged at the oral argument, the ethics and propriety of subjecting busy and harassed officials, defendants and others, to a long course of discovery depositions should be carefully considered. Modern summary judgment procedures, however, afford good means of promptly eliminating from a case parties who should not be in it, as was done in *David v. Cohen, supra*, and in *Joyce v. Ferraro*, 323 F. 2d 931 (1st Cir. 1963). There is really no limit to the nature of information that may be put before a court on a motion for summary judgment, and I am therefore not at all certain that treating as a threshold question the issue of immunities, as distinguished from the merits

...helps to protect busy officials from harassment by ...torious suits.

...P. L. 91-358, approved July 29, 1970, Title V, § § 501 ... 502, Layton and Prete would have had the right to be ...ented by the D. C. Corporation Counsel if this suit ...had been brought after the date of enactment. As it is, ...defense is apparently a matter of grace. The Corp... Counsel did represent them before us. While the ...judge will have authority to allow amendment to the ...plaint, I see all this as reason to be cautious indeed ...respect to amendments that would add any new ...against the defendant police officials, not asserted ...July 29, 1970. The original complaint did not allege ...Layton and Prete knew Carlson was in the habit of ...brass knuckles; plaintiff would like to add this. I ...it as a new charge. The original complaint only ...deficient performance in their supervisory or man... capacities, and this goes further.

...now to the liability of the municipality. In view ...holding that it is liable for either a negligent injury ...intentional assault inflicted by Carlson upon Carter, ...proved, I find it difficult to imagine how the alleged ...of Layton and Prete, or anyone else, or their ...ligence, would either enhance or diminish the ...pality's liability as it would otherwise be. If it ...make a difference, I find it hard to understand how ...could be negligent enough to expose the municipality ...bility *for their negligence*, without being negligent ...to lose their immunity to personal liability, quali... it is. This notion may be valid in other contexts, ...here. The opinion of the court thus starts some ...that lack bodily substance, I believe.

...al, it appears to me that the law being left, as ...in this area, to be made by judges, judges ...make it as this second part does. In the existing

state of our society, we have to have policemen, and policemen who are combative when that quality is needed. Training and discipline do wonders, but at best, a combative person is not always able to turn his combativeness on and off as lawyers and judges deem proper. Therefore, despite the best efforts of those in authority, policemen will at times use excessive force or attack people without lawful cause. Those wronged are not wronged by the policeman alone or even chiefly, and not by the supervisor merely because he has failed to give the very best training and instruction. It is the municipality which employs the policeman, because it knows of no other way to hold the forces of evil in check, and has failed to diminish them or remove the causes that bring them into being, with any real effectiveness. Thus it appears very unjust for a citizen, injured in such an encounter, to have to look for redress only to a patrolman who maybe cannot even be served with process, like Carlson here, or is judgment proof. It is not much more satisfactory if he can sue supervisory officials who most likely were doing everything possible according to their lights to avert the evil that occurred. The municipality which arms and uniforms an untrained person and puts him on the streets without need, in anything short of a desperate emergency, has committed a grievous wrong.

On the other hand, one must consider that many suits will be groundless. Sufficient exposure to these, and the effort required to defeat them—even if counsel fees are not a factor—might lead policemen to refuse to take decisive action that would be lawful and needs to be taken. Here, it seems that a sharing of the exposure, by the municipality, would be conducive to the disinterested and fearless police action we all desire. The Congress has recognised the possibly chilling effect of groundless suits upon police initiative in the new legislation above mentioned, and I think today's decision conforms to the same

considerations and policy. The policeman no longer stands in court alone and undefended.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 339-69

MELVIN CARTER, *Plaintiff*

v.

JOHN R. CARLSON, et al., *Defendants*

FILED MAY 15, 1969

ORDER

The plaintiff, Melvin Carter, moves the Court to revise the Order of April 25, 1969, dismissing this action as to the defendant, District of Columbia, to read as follows:

ORDERED, that the motion to dismiss the complaint be, and the same is, hereby granted, and there being no just reason for delay, the Clerk is hereby directed to enter final judgment for the said defendant.

/s/ Matthew F. McGuire
Judge

ASSENTED TO:

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POINTS AND AUTHORITIES

Rules 54B, 60A of the Federal Rules of Civil Procedure

The effect of this revision upon the dismissal previously granted by the Court is to authorize the Clerk to enter final judgment for the defendant, making the Order appealable under Rule 54B.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,225

SEPTEMBER TERM, 1970

Civil Action 339-69

MELVIN CARTER, *Appellant*,

v.

JOHN R. CARLSON, ET AL.

FILED JULY 23, 1971

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, ROBINSON, Circuit Judge, and NICHOLS,* Judge, United States Court of Claims.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause dismissing the complaint is hereby reversed, and this case is hereby remanded to the District Court for further proceedings on all counts, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
Nathan J. Paulson, *Clerk*

Dated: July 23, 1971.

Opinion by Chief Judge Bazelon

Concurring opinion by Judge Nichols.*

*Sitting by designation pursuant to 28 U.S.C. § 293(a)(1964).

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion but its order dis-ing the complaint against the District of Columbia is forth at page 1b in Appendix B to the Petition for Writ Certiorari. The opinion of the Court of Appeals for the rict of Columbia Circuit is not yet reported in the Fed- Reporter, but is reproduced as Appendix A to the Peti- for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the Court of Appeals err in deciding that the District of Columbia is a "person" for purposes of 42 U.S.C. 1983, in view of the facts that (a) local law recognizes municipal liability in the circumstances of this case, and (b) the legislative history of the statute indicates that Congress intended to extend immunity only to those state municipalities which possessed immunity under local common law and over whose common law liability Congress possessed no legislative jurisdiction?

STATUTES INVOLVED

42 U.S.C. §1983 is the only statute involved. It is reproduced in its entirety at page two of the Petition.

ARGUMENT

The petitioner fails to present any question of sufficient importance to warrant further review by this Court. The ruling below was founded upon two separate and independent grounds. First, the Court reasoned that the exemption of municipalities from the operation of 42 U.S.C. §1983, mandated by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961), was founded upon Congress's intent to leave questions of municipal liability and immunity to the exclusive control of the states. Since the sovereign immunity of the District of Columbia has been largely abolished, except for acts committed in the exercise of discretionary functions,

Spencer v. General Hospital, 138 U.S. App. D.C. 48, 425 F.2d 479 (1969) (*en banc*), the rationale of *Monroe* is inapplicable to the District. Accordingly, there is no reason to exclude the District from the class of possible defendants in lawsuits seeking damages for personal injuries under Section 1983, and there is no basis for claiming that Congress intended so to exclude the District.

The Court below also pointed out that *Monroe* was distinguishable on the basis of the unique relationship between Congress and the District. The *Monroe* ruling, relying as it does upon extensive debates in the post-Civil War Congress which adopted Section 1983, reflects the then current notion that it was beyond Congress' Constitutional powers to interfere substantially with the control the states have over their powers of appropriations and taxation by imposing new liability upon governmental entities which are creatures of the states themselves. This constitutional concern could not, of course, have any effect on Congress' dealings with the District of Columbia, since Congress has always had complete legislative jurisdiction over the District.

It is the second of these two independent bases of decision which makes this case entirely distinguishable from *Monroe v. Pape, supra*, and its progeny. All of the cases following *Monroe*, notably *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969) and *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968), have involved municipalities created by the states in which they are located and having substantial independence from the federal government in the exercise of their governmental jurisdiction. In none of those cases has there been independent analysis of the holding or underlying rationale of *Monroe*. Rather, the application of the rule has

been mechanical, as indeed it should be, since there is no relevant basis for distinguishing the municipalities involved. The District of Columbia, however, falling wholly within the jurisdiction of Congress, as it does, is clearly distinguishable from all other municipalities, and that distinction leads ineluctibly to the conclusion that the District may be subject to liability under §1983 while Chicago may not. There is, accordingly, no conflict between the decision of the District of Columbia Circuit in this case and the decision of this Court in *Monroe v. Pape, supra,* or the decisions of other Courts of Appeals. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934).

For similar reasons, Petitioner's claim of a conflict with the decision of the Ninth Circuit in *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968) and the decision of the Sixth Circuit in *Patrum v. City of Greensboro*, 419 F.2d 1300 (6th Cir. 1969), is without merit. The holdings of those cases are accurately stated in the Petition. That they do not conflict with the holding of the District of Columbia Circuit in this case, however, is clear from a consideration of the second basis for the District of Columbia Circuit's decision. The Ninth and Sixth Circuits held that "the Monroe rationale does not cease to be applicable where the governmental unit involved may be compelled to respond in damages under the laws of the state in which it is located." Petition, pp. 5-6. But because of Congress' peculiar relationship with the District and because Congress has complete control of the District's power to raise and expend revenues, the rationale of the *Monroe* decision, as indicated above, is inapplicable to the District of Columbia. The decisions of the Ninth and Sixth Circuits dealt only with municipalities created by states, whereas the decision below dealt with the one municipality created by Congress.

This difference in the identities of the creators of the municipalities involved is fundamental. What the District of Columbia Circuit has to say about the liability and immunity of the District of Columbia under Section 1983 has absolutely no effect upon the liability and immunity of the Town of Caliente or the City of Greensburg under that same section. Contrary to petitioner's claim, the purported conflict among the Circuits thus does not lead to different results in identical cases, dependent upon the Circuit in which the suit was instituted, and there is accordingly no need for this Court to review the decision below. *Commissioner v. Factor*, 364 U.S. 932 (1961), *Factor v. Commissioner*, 364 U.S. 933 (1961).

Finally, petitioner attempts to invoke the certiorari jurisdiction of this court on the ground that the ruling below will subvert the intent of the District of Columbia Court Reform and Criminal Procedures Act of 1970, P.L. 91-358, to transfer common law actions of this type against the District Court to the Superior Court. It is clear, however, that under Rule 20 of the Federal Rules of Civil Procedure those who have a right of action under Section 1983 against officers of the District of Columbia Government could sue those officers in the District Court and join their common law claims against the District under theories of pendant jurisdiction. *Hurn v. Oursler*, 289 U.S. 238 (1933); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968), *Gitmore v. James*, 274 F. Supp. 75 (N.D. Texas 1967), *aff'd*, 389 U.S. 572 (1968). Accordingly, the amenability of the District to suit in the District Court is essentially unaffected by the decision.

CONCLUSION

Petitioner has failed to advance any argument justifying further review of this case by this Court. The questions it claims to present are notably devoid of any importance beyond the boundaries of the District of Columbia, and even that importance is minimal. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MARIE CATON, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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Petition for Certiorari Filed October 21, 1971
Certiorari Granted January 10, 1972

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Supreme Court of the United States

TERM 1971

No. 71-564

DISTRICT OF COLUMBIA, *Petitioner*,

v.

MELVIN CARTER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court of appeals is reported at 447 F. 2d 358 and is contained in the appendix to the certiorari petition at 1a.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1971 (C. A. at 1c). The petition for a writ of certi-

[1] References to the appendix to the certiorari petition will hereinafter be prefaced with the designation "C. A.," and references to the single appendix will be prefaced with the designation "A."

orari was filed on October 21, 1971, and granted on January 10, 1972. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

STATUTE INVOLVED

R. S. § 1979, 42 U. S. C. § 1983. Civil Action for Deprivation of Rights.

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied.)

QUESTION PRESENTED

Whether the District of Columbia, as a congressionally-created municipal corporation, is a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983.

STATEMENT

In a civil action filed in the United States District Court for the District of Columbia on February 12, 1969, respondent sought to recover damages for alleged assault and battery, deprivation of civil rights, and negligence. Named as defendants were the District of Columbia, a municipal corporation, the Chief of the Metropolitan Police Department, a police precinct captain, and a police officer (A. 1, 2-4, 5).

Respondent alleged in his amended complaint that in 1968 he was assaulted by the police officer who, "acting

under color of law and in his capacity as a police officer," beat him with brass knuckles while he was held by two other officers, and arrested him without justification or probable cause. Respondent further alleged that the precinct captain, the Chief of Police, and the District of Columbia negligently failed to train, instruct, supervise, and control the officer with regard to the circumstances in which (1) an arrest may be made, and (2) various degrees of force may be used in making an arrest. Respondent asserted both a common law theory of tort liability and an action for deprivation of civil rights under R. S. § 1979, 42 U. S. C. § 1983. (A. 2-4, 5.)

The police officer was never found for service of process. The precinct captain and the Chief of Police moved to dismiss the complaint on the grounds that it failed to state any basis for relief, and that they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim and also on the ground of sovereign immunity (A. 4). The District Court subsequently dismissed the complaint as to all defendants (A. 5).

On July 23, 1971, the United States Court of Appeals for the District of Columbia Circuit reversed the orders of the District Court. Respecting the District's asserted tort liability, the court held that, although a municipal corporation, the District was nonetheless a "person" amenable to respondent's action for damages under R. S. § 1979, 42 U. S. C. § 1983 (C. A. 18a-22a). The court also held that the District could not escape liability under the doctrine of sovereign immunity, even though the United States would be immune from liability under similar circumstances under the Federal Tort Claims Act, 42 U. S. C. § 2680(h) (C. A. 12a-18a).

SUMMARY OF ARGUMENT

The ruling of the court of appeals that the District of Columbia, as a congressionally-created municipal corpora-

tion, is a person within the meaning of R. S. § 1979, 42 U. S. C. § 1983, cannot be squared with the legislative history of that enactment and with this Court's holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961). Each makes plain that, in specifically rejecting a proffered amendment designed to bring municipalities within the reach of R. S. § 1979, Congress adopted an across-the-board rule of municipal non-liability in federal courts.

The court of appeals concluded that under *Monroe* municipalities are immune from liability under R. S. § 1979 *only* to the extent that they enjoy immunity under local law, and additionally concluded that, because the doubt of Congress as to its constitutional power to impose new liability on municipalities would not extend to the District of Columbia, Congress intended to impose liability on the District under R. S. § 1979. Both of these conclusions are erroneous.

Although the applicability of the immunity doctrine to the issue of municipal liability under R. S. § 1979 was urged to this Court in *Monroe*, this Court's construction of R. S. § 1979 was in no way based on local immunity considerations, but on legislative history which demonstrates a congressional intent to unqualifiedly exempt municipalities from liability. Moreover, the lower court's holding that local immunity considerations must serve as the guide to construction of R. S. § 1979 is in irreconcilable conflict with the established doctrine of uniformity in the application of federal civil rights legislation.

The court's holding that Congress included the District within R. S. § 1979 by virtue of its special legislative power over the District under the Constitution is necessarily based on the premise that Congress intended to single out the District among all other governmental bodies in the creation of the new kind of federal liability envisioned by R. S. § 1979. That premise will find support neither in the legis-

debates on R. S. § 1979, nor in the historical background which gave rise to its enactment.

Finally, because R. S. § 1979 is concerned with actions taken under color of state law, as opposed to actions interlocked with congressionally enacted legislation, it has no application where, as here, the action complained of is attributed to a congressionally-created police department, charged with the task of enforcing Acts of Congress and implementing regulations in the federal city.

ARGUMENT

The District of Columbia, as a congressionally-created municipal corporation, is not a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983.

The District of Columbia challenges the ruling of the court of appeals that it is a "person" within the meaning of R. S. § 1979, 42 U. S. C. § 1983, which reads as follows:

> "Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied.)

R. S. § 1979 was enacted into law as § 1 of the Ku Klux Act of 1871, 17 Stat. 13. As noted by this Court in *Monroe v. Pape*, 365 U. S. 167 (1961), upon a review of pertinent legislative history, the Ku Klux Act was the response of Congress to a problem of widespread violence in the South and the inability or unwillingness of public officers to enforce state laws in a manner which adequately dealt with such violence. 365 U. S. at 172-180. R. S. § 1979 was de-

signed to afford a federal right in a federal court to persons whose constitutional rights were being violated under color of state law. 365 U. S. at 178-180, 183. It combined with various other sections of the Ku Klux Act which were designed, *inter alia*, to punish conspiracies to interfere with federal or state officials in the performance of their duties, and conspiracies to deny individuals equal protection of the laws (§ 2); to permit the President to intervene with federal military forces when domestic violence so obstructed law enforcement as to deprive citizens of their constitutional rights, under circumstances where state officials could not or would not protect these rights (§ 3); and to authorize the President to suspend the writ of habeas corpus when unlawful combinations rose to the level of rebellion against the government of the United States (§ 4). See Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light On State Action On The Fourteenth Amendment*, 11 St. L. L. J. 331 et seq. (1967).

After considerable congressional debate on various features of the 1871 Act, Senator Sherman of Ohio twice proposed an amendment to R. S. § 1979 which would have expanded that section's coverage to make municipalities as well as individuals subject to suit in a federal court for civil rights deprivations. But Congress twice rejected such a proposal (Cong. Globe, 42nd Cong., 1st Sess. at 663, 725, 749, 755, 800, 801, 804). And see 11 St. L. L. J. at 368-376. It is the position of the District of Columbia that, as a congressionally-created municipal corporation, it is not a "person" within the meaning of R. S. § 1979, and that the contrary ruling of the court of appeals cannot be squared with this Court's holding in *Monroe* v. *Pape*.

In *Monroe*, as in this case, R. S. § 1979 was invoked in an attempt to subject a municipality (the city of Chicago) to tort liability in a federal court for alleged police misconduct. There, as here, the Court was concerned with the question of whether a municipality was a "person" within

the meaning of that enactment. In urging to the Court that the statute envisioned governmental as well as individual liability, the petitioners in *Monroe* (brief at 28-30) placed great reliance on an Act of Congress entitled "An Act Prescribing the Form of the Enacting and Resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof," passed on February 25, 1871, just seven weeks prior to R. S. § 1979. This enactment provided, *inter alia*, that "the word 'person' may extend and be applied to bodies politic and corporate." 16 Stat. 431. This Court unanimously held, however, that this statutory definition was not controlling, thus rejecting the notion that "bodies politic and corporate" are persons within the meaning of R. S. § 1979 (365 U. S. at 190-191). In so holding, the Court emphasized the defeat by Congress of two different versions of the amendment proposed by Senator Sherman of Ohio whereby municipalities were to be held liable for certain acts of violence occurring within their boundaries, and the substitution in place of the Sherman amendment of a provision extending liability in damages to " 'any person or persons, having knowledge that any' of the specified wrongs are being committed" (365 U. S. at 188-190).[2] Based upon its extensive exami-

[2] This congressional substitution of the individual liability concept for the governmental liability concept is traceable to § 6 of the 1871 Act, now R. S. § 1981, 42 U. S. C. § 1986. The language of § 6 is wholly consistent with the position expressed by numerous lower federal courts that the 1871 Act provides for relief only against individuals personally involved in the deprivation of constitutionally protected rights, and as such cannot give rise to liability on a *respondeat superior* theory, even apart from its inapplicability to governmental bodies. See, for example, *Adams* v. *Pate*, 445 F. 2d 105 (7th Cir., 1971); *Bennett* v. *Gravelle*, 323 F. Supp. 203, 214 (D. Md., 1971); *Palermo* v. *Rockefeller*, 323 F. Supp. 478, 483 (S. D. N. Y., 1971); *Boreta* v. *Kirby*, 328 F. Supp. 873, 874 (N. D. Cal., 1971); *Barrows* v. *Faulkner*, 327 F. Supp. 1190 (N. D. Ohio, 1971); *Sanburg* v. *Daley*, 306 F. Supp. 277, 278 (N. D. Ill., E. D., 1969); *Fanburg* v. *City of Chattanooga*, 330 F. Supp. 1047 (E. D. Tenn., S. D., 1968); *Salazar* v. *Dowd*, 256 F. Supp. 220, 223 (D. Colo., 1966); *Jordan* v. *Kelly*, 223 F. Supp. 731 (W. D. Mo., W. D., 1963); see also 11 St. L. L. J. at 374-376. The contrary notion expressed by the court of appeals (C. A. App. 72a, n. 39) will find support only in a distinct minority of the reported decisions.

nation of legislative history, the Court attributed to Congress, in rejecting the Sherman amendment, a clear intent to limit the application of the term "person" to individuals, as opposed to governmental entities.

To be sure, the District of Columbia, as a congressionally-created municipal corporation, is and has been since its creation a body "politic and corporate." See *Barnes* v. *District of Columbia*, 91 U. S. 540 (1875); *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1 (1889); *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953). Consequently, when the Court unanimously rejected the notion that Congress, in enacting R. S. § 1979, intended to include "bodies politic and corporate" within the meaning of the word "person," the Court adopted a principle necessarily applicable to the District of Columbia in this case. And when Congress, in rejecting the Sherman amendment, evidenced its intent to draw a clear line of demarcation between persons and governmental entities within the meaning of R. S. § 1979, Congress effectively negated the notion that the District logically falls within the reach of that statute.

The court of appeals gave "two independent reasons" (C. A. 19a) for its holding that the District of Columbia is a "person" within the meaning of R. S. § 1979 and thus subject to suit for damages thereunder:

First, that *Monroe* held that municipalities are immune from liability under R. S. § 1979 *only* to the extent that they enjoy immunity under local law (C. A. 18a-20a).

Second, that because the reason Congress excluded municipalities from the scope of R. S. § 1979, i.e., doubt that it could constitutionally impose new liability on municipalities, does not apply to the District of Columbia, Congress intended to impose liability on the District under R. S. § 1979 (C. A. 21a).

The District submits that any objective analysis of these reasons will inexorably lead to the conclusion that they

emasculate the construction placed on R. S. § 1979 by the Court in *Monroe*. Each of the reasons will be separately discussed.

A

R. S. § 1979 does not incorporate municipal immunity under local law.

There are a number of reasons why the notion that R. S. § 1979 incorporates municipal immunity under local law should not be countenanced by this Court.

First, if the ruling of the court of appeals in favor of such incorporation is correct, it is only because Congress so intended. However, a consideration of the legislative history of R. S. § 1979 will lend no support to such a congressional intent. When the 1871 Congress enacted R. S. § 1979, there was no ironclad rule of municipal immunity or municipal non-immunity. The decisions of this Court tell as much. See, e.g., *Barnes* v. *District of Columbia*, *supra*, 91 U. S. at 551; *Fowle* v. *Alexandria*, 28 U. S. (3 Pet.) 398 (1830). Certainly then, it should not be presumed that Congress was oblivious to existing law at the time it enacted R. S. § 1979. Indeed the debates on the Sherman amendment stand as clear congressional recognition that some municipalities were then subject to liability under state law in connection with the very subject matter of that amendment, whereas other municipalities were not locally subjected to this kind of liability. (Cong. Globe, 42nd Cong., 1st Sess. at 751, 752, 757, 760, 761, 762, 765, 771, 772, 773, 788, 791, 794, 798, 799, 800.) Had it deemed it appropriate, Congress could have provided in R. S. § 1979 that municipalities would be subject to suit in federal courts to the extent that local law recognizes their liability, but the fact is that Congress did not so provide. Clearly, then, the lower court's attempt to infer from congressional silence an intent to significantly alter the Federal-State balance

and to thus substantially extend federal judicial resources is plainly unjustified. Cf. *United States* v. *Bass*, —— U. S. —— (No. 70-71, decided December 20, 1971, slip op. at 12-14).

In asserting that the congressional rejection of the municipal liability concept was based on constitutional considerations "designed to avoid interfering with the liability of municipal governments," and in thus making the immunity doctrine the controlling standard for determining municipal liability under R. S. § 1979 (C. A. at 19a-20a), the court of appeals plainly placed unjustified reliance on the *motive* of Congress in disregard of the *intent* or *purpose* of Congress in legislating as it did. In this respect, the court obviously failed to distinguish between *what* Congress actually did and *why* it did it. And "[i]n a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted." *New York State* v. *Roberts*, 171 U. S. 658, 681 (1898) (Mr. Justice Harlan dissenting). Accord *Palmer* v. *Thompson*, 403 U. S. 217, 224-226 (1971). The natural and reasonable effect of R. S. § 1979, when considered in light of the legislative debates on the Sherman amendment, was the unqualified adoption by Congress of a uniform federal rule of municipal non-liability, and that rule cannot be modified by any constitutional considerations which may have motivated Congress to exclude municipalities from the reach of R. S. § 1979.

Second, the question of the impact of the doctrine of sovereign immunity on the construction of R. S. § 1979 was, in fact, tendered to the Court in *Monroe* v. *Pape*. In their brief, petitioners, citing many authorities dealing with the application of the doctrine, asserted that the doctrine was obsolete and unjust, and called upon the Court to adopt a construction of R. S. § 1979 whereby state law rules of municipal immunity should not be permitted to control the ap-

pretation of R. S. § 1979 (brief for petitioners at 23-24, 34-36). In answering this argument, respondents pointed to an Illinois statute removing "from Chicago governmental immunity for the acts of its police except where such acts are the result of 'willful misconduct,'" and urged that the city could not be held responsible in federal courts for *ultra vires* acts of its police in contravention of state and local laws (brief for respondents at 3, 24-28). But the Court did not rule in favor of municipal non-liability because the city of Chicago was immune from suit under local law, and the Court in no way suggested that the question of municipal immunity under local law should be linked to the question of municipal liability under R. S. § 1979. Instead, the Court ruled in favor of across-the-board municipal non-liability. In an era concerned with an evolving concept of municipal immunity, it is inconceivable that the Court would have failed to incorporate the immunity doctrine into R. S. § 1979 (and thus base its decision on a narrower ground) if the Court then believed that such incorporation was required by the legislative history of that enactment. It is submitted that the very failure of the Court to place such a qualified construction on R. S. § 1979 is a tacit rejection of the rationale embraced by the court of appeals.[8]

Third, the lower court's construction of R. S. § 1979 as incorporating local law applicable to municipal immunity is inconsistent with the established principle that federal law should be uniform. Or as Mr. Justice Jackson noted

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[8] The District is unaware of any other circuit court of appeals ruling which agrees with the lower court's ruling that municipalities are persons within the meaning of R. S. § 1979, to the extent that they lack immunity from suit under local law. Two circuit courts of appeals have expressed a contrary view. See: *Brown* v. *Town of Caliente, Nevada*, 392 F. 2d 546 (9th Cir., 1968); *Patrum* v. *City of Greensburg, Kentucky*, 419 F. 2d 1300 (6th Cir., 1969).

in his concurring opinion in *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 471-472 (1942):

> "* * * Federal law is no judicial chameleon changing complexion to match that of each state wherein lawsuits happen to be commenced * * *."

And in *Jerome* v. *United States*, 318 U. S. 101, 104 (1943), the Court said:

> "* * * But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. * * *"

Accord: *N.L.R.B.* v. *National Gas Utility District*, 402 U. S. 600, 603 (1971). And see *Workman* v. *New York City*, 179 U. S. 552 (1900). See also brief for petitioners in *Monroe* at 52-58.

The uniformity principle is certainly no less applicable where, as here, the case involves a Civil Rights Act of national application. As pointed out in *Basista* v. *Weir*, 340 F. 2d 74, 86 (3rd Cir., 1965):

> "The Civil Rights Acts were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Act were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from the state to state * * *."

And in *Monroe*, this Court found "three main aims" of the 1871 Act: to override certain kinds of state laws, to provide a remedy where state law was inadequate, and to provide a remedy where the state remedy, though adequate in theory, was not available in practice. 365 U. S. at 173-174. Manifestly, then, the 1871 Congress did not intend to make federal remedies depend on state law, but consistent with the principle of federal uniformity, intended to afford the same type of relief to persons residing within the various states. In clear contravention of that principle, the court below would condition the reach of the federal remedy under R. S. § 1979 on the judgments of local legislators, permitting them to expand or contract such a remedy as they see fit at any given time in history.[4] Any fair consideration of such a notion in light of this Court's ruling in *Monroe* will inexorably compel the conclusion that, in the judgment of the 1871 Congress, there was to be across-the-board governmental non-liability.

The District is not unmindful of those post-*Monroe* commentaries which assert, in effect, that this Court should overrule *Monroe* by holding that municipalities are persons within the meaning of R. S. § 1979, to the extent that they lack immunity from tort liability under local law. See Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131 (1972); Note: *Developing Governmental Liability Under 42 U. S. C. § 1983*, 55 Minn. L. Rev. 1201 (1971);

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[4] Because the intent of Congress was to completely exclude municipal liability from the reach of R. S. § 1979, the incorporation of local immunity principles into that statute by force of 42 U. S. C. § 1988 would amount to a clear conflict with the federal policy manifested in R. S. § 1979 as opposed to merely a mere deficiency in remedy. The contrary rationale of the court of appeals (C. A. at 20a) plainly sanctions the borrowing of a state remedy "inconsistent with the * * * laws of the United States * * *" and is thus in variance with 42 U. S. C. § 1988. Compare *Baker* v. *F & F Investment*, 420 F. 2d 1191 (7th Cir., 1970), cert. denied, 400 U. S. 821 (1970), with *Wilder* v. *Gain*, 311 F. Supp. 754 (N. D. Cal., 1970).

Comment: *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. Col. L. Rev. 105 (1971). But as this Court has made plain, where, as here, the issue is one of interpretation of a statute readily susceptible of legislative amendment, as opposed to interpretation of the Constitution, a departure from a previous decision cannot be justified unless it appears beyond doubt that such decision misapprehended the meaning of the applicable statute. *Monroe* v. *Pape*, 365 U. S. at 185; *id.* at 192 (concurring opinion of Mr. Justice Harlan). Clearly, that is not the situation here. And as the commentators also note (45 S. Cal. L. Rev. at 144, 55 Minn. L. Rev. at 1209, n. 37), while the United States Commission on Civil Rights, in 1961 and again in 1965, recommended that *Monroe* be legislatively reversed by an appropriate amendment to R. S. § 1979, no such amendment has yet been adopted by Congress.

B

The District's status as a federally-created municipal corporation does not bring it within the reach of R. S. § 1979 as construed by this Court.

Adverting to this Court's ruling in *Monroe*, the court of of appeals asserted that the basis for rejection of municipal liability under R. S. § 1979 was that Congress doubted its constitutional power to impose a new liability on state-created municipalities. The court then reasoned that, because Congress could entertain no such constitutional doubt concerning its authority to legislate for the District, under Article I, Section 8, Clause 17, of the Constitution, Congress intended to subject the District to liability under R. S. § 1979 (C. A. at 21a). But it by no means follows, however, that Congress intended to make R. S. § 1979 applicable to the District, simply because it had the power to do

Here again the court has placed unjustified and erroneous reliance on the *motive* of Congress as distinguished from its legislative *purpose* (see cases cited at 10, *supra*). As previously pointed out, *Monroe* makes plain that the rejection by Congress of the Sherman amendment and the substitution in its place of language of individual liability in § 6 of the 1871 Act (R. S. § 1981, *supra*) is indicative of a legislative purpose to draw a clear line of demarcation between personal and governmental liability under R. S. § 1979. The constitutional motive of Congress for doing so certainly should not require a departure from the construction given R. S. § 1979 in *Monroe* simply because the municipality involved here is federally created.

The conclusion that Congress intended to bring the District within the purview of R. S. § 1979 because the District is a municipality of its own creation necessarily involves the conclusion that, in spite of its rejection of the concept of governmental liability as envisioned by the Sherman amendment, Congress intended to create an exception for the District, thus setting it apart from all other governmental bodies. In this connection, the court of appeals concedes, as it must, that under *Monroe* state-created municipalities are not persons under R. S. § 1979. But it is equally clear from *Monroe* that the concept of federalism, on which rejection of the Sherman amendment was based, requires the conclusion that neither a state nor any of its political subdivisions are persons within the meaning of that enactment. 365 U. S. at 190-191. See also comments of Representative Willard, Cong. Globe, 42nd Cong. 1st Sess. at 791; comments of Representative Poland, *id.* at 793 (cf. J.A. at 21a). And since the United States is not a person within the ambit of R. S. § 1979,[5] the notion that Congress

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[5] In numerous post-*Monroe* decisions, lower federal courts have held that the assumption recognised in that case is applicable to governmental entities in general, whether federal, state, or local in nature. See, for example, *Zuckerman v. Appellate Division, etc.*, 421 F. 2d 625 (2nd Cir., 1970); *Accardi* v.

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intended to single out the District as the sole governmental body for inclusion in R. S. § 1979, if valid, should surely find clear support in the legislative history of that enactment. But the court of appeals did not, and indeed could not, point to any legislative history which attributes to Congress an intent to engage in any such singling out. And the debates on the Sherman amendment makes it plain that the concern of Congress was whether to extend R. S. § 1979 to include municipal liability in general, not whether to distinguish among particular governmental bodies in the creation of federal liability. See 11 St. L. L. J. at 368-376. In the absence of legislative history expressing a contrary intention, the conclusion that Congress, by its silence, intended the unique result of including the District within R. S. § 1979, while excluding all other governmental bodies from its coverage, is plainly unjustified. Cf. *Schilb* v. *Kuebel*, —— U. S. —— (No. 70-90, decided December 20, 1971, slip op. at 14).

In *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), this Court held that the concept of constitutional equality requires that the District's civil rights obligations respecting school desegregation be measured by the same criteria that applies to other governmental entities throughout the nation. The same considerations should be no less appropriate in determining the inapplicability to the District of R. S. § 1979.

Nor is there any logical reason why the 1871 Congress would have singled out the District for special legislative

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United States, 435 F. 2d 1239, 1241 (3rd Cir., 1970); *United States ex rel. Gilliemacker* v. *County of Philadelphia*, 413 F. 2d 84, 86 (3rd Cir., 1969); *Dodd* v. *Spokane County, Washington*, 393 F. 2d 330, 334 (9th Cir., 1968); *Wilford* v. *California*, 352 F. 2d 474, 476 (9th Cir., 1965); *Bennett* v. *Gravelle*, 323 F. Supp. 208 (D. Md., 1971), and cases cited at 211; *Toa Baja Development Corporation* v. *Garcia Santiago*, 313 F. Supp. 899 (D. Puerto Rico, 1970), and cases cited at 903. See also: Note: *Civil Rights—School Officials Not Persons For Purpose of Section 1983, Regardless of Relief Sought*, 24 Southwestern L. J. 360 at 362 (1970); cf. Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. Pa. L. Rev. 389 at 390 (1970).

consideration in enacting R. S. § 1979. As the Court made plain in *Monroe*, the general aim of the 1871 Act, of which R. S. § 1979 is a part, was to provide for federal controls because of an inability of state governments to cope with those violating the civil rights of others within their respective territorial limits (365 U. S. at 172-176). Yet, the applicability of this rationale to the District of Columbia would be tantamount to a congressional recognition that pre-existing controls in the federal city were inadequate in the absence of the 1871 Act. Certainly, the Reconstruction Congress had no such notion in mind.

In the decade preceding enactment of the 1871 Act, Congress articulated a distinct legislative policy designed to implement civil rights in the District of Columbia. By successive Acts, Congress abolished slavery in the District of Columbia (Act approved April 16, 1862, 12 Stat. 376); made all District residents amenable to civil laws, ordinances and penalties without regard to race (Act approved May 21, 1862, 12 Stat. 407); prohibited racial discrimination in District of Columbia street car transportation (Act approved March 3, 1865, 13 Stat. 536); and provided that individuals shall be entitled to vote in any election in the District without distinction on account of color or race (Act approved January 8, 1867, 14 Stat. 375).[8] These matters, unlike the matters which prompted enactment of the Ku Klux Act of 1871, obviously commended themselves to the specific concern of Congress as the District's legislative body.

Moreover, as this Court also emphasized in *Monroe:*

> "• • • It is abundantly clear that one reason the [1871] legislation was passed was to afford a

[8] In the Organic Act of February 21, 1871, 16 Stat. 419, which established the District of Columbia as "a body corporate for municipal purposes," Congress vested legislative power and authority in a Legislative Assembly consisting of a Council and a House of Delegates. In 1872 and 1873, that legislative body passed the Acts prohibiting racial discrimination on the part of proprietors of restaurants with which this Court was concerned in *District of Columbia* v. *Thompson Co.*, *supra*.

federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (365 U. S. at 180; emphasis supplied.)

Prior to 1871, however, Congress had provided for a court system in the federal city which combined the powers and jurisdiction of a local court system with the powers and jurisdiction of a Circuit and District Court of the United States. See Act of March 3, 1863, 12 Stat. 762-765; and see Noel, *The Court House of the District of Columbia*, Law Reporter Printing Co., Washington, 1939, at 53, 66. Certainly, in enacting R. S. § 1979, Congress had no reason to confer judicial remedies which then pre-existed at the seat of government.[7]

Clearly, therefore, any fair consideration of the concerns of the 1871 Congress to override certain kinds of state laws (365 U. S. at 173), to afford a then non-existent right in a federal court (365 U. S. at 178-180), and to create federal law enforcement controls in the absence of adequate state controls (365 U. S. at 172-176), will render inescapable the conclusion that the 1871 Congress had no valid reason

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[7] With the advent of the recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 et seq., the notion that Congress intended to permit plaintiffs in cases like the instant one to elect whether to sue in the United States District Court for the District of Columbia or in the District of Columbia Superior Court is even less compelling. In that Act, Congress transferred a wide range of jurisdiction over local matters from the District Court to the Superior Court. 84 Stat. at 484-485. But, in spite of the fact that the Superior Court is fully equipped to dispense justice in cases like the intant one, respondent and many others may continue to seek damages against the District of Columbia in the District Court in myriad types of civil rights actions under R. S. §-1979, if the ruling of the court of appeals is allowed to stand.

for including the District as the sole governmental entity within the ambit of R. S. § 1979.

There is additional reason for the inapplicability of R. S. § 1979 in this case, even apart from the notion that, as a governmental body, the District is not a person within the purview of that enactment. As this Court has made plain, R. S. § 1979 is concerned with actions taken under color of state law, but not with actions interlocked with laws enacted by Congress. See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 650 (1963); see also: *Williams* v. *Rogers*, 449 F. 2d 513, 517 (8th Cir., 1971). The action of which repondent essentially complains arose out of the performance of duty by a member of the Metropolitan Police Department at the seat of government. That Department was created by Congress. See R. S. D. C. § 321, § 4-101, D. C. Code, 1967. Its functions involve the enforcement of Acts of Congress and implementing regulations promulgated pursuant to congressionally conferred authority. As such, its operation constitutes a derivative type of sovereignty traceable to the constitutional power of Congress to legislate exclusively for the District of Columbia. In *Metropolitan R. Co.* v. *District of Columbia, supra*, this Court said (132 U. S. at 9):

> "• • • • the sovereign power of • • • [the District] is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. • • •"

This Court went on to note that "crimes committed in the District are not crimes against the District but against the United States" (*id.*). To be sure, if respondent had complained of law enforcement-related misconduct on the part of a United States Park policeman, a United States Capitol

policeman, or any other law enforcement officer associated with the United States government, there would be no action under color of state law within the meaning of R. S. § 1979. Consistency requires the application of a similar principle where, as here, the asserted misconduct is attributed to a Metropolitan Police officer in the performance of law enforcement functions in the federal city.[8] Cf. *Penn Bridge Co.* v. *United States*, 29 App. D. C. 452, 457 (1907). In each case, the actions occur under color of federal law and, as such, cannot be brought within the ambit of that enactment. Contrary to the ruling of the court appeals, therefore, the District's federal character strengthens rather than weakens the proposition that, as a congressionally-created municipal corporation, it is not a "person" within the purview of R. S. § 1979.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below, to the extent that it holds the

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[8] Under the Federal Tort Claims Act, the United States government has been specifically exempted from liability for international torts like that alleged here. See 42 U. S. C. § 2680(h). The District urged to the court of appeals that its tort liability should not be measured by more stringent standards than those applicable to the United States conformably with the proposition that, because municipal immunity is an extension of sovereign immunity, a municipality's tort liability should not be broader in scope than that of the sovereign from which municipal powers are derived. See *Bernardine* v. *City of New York*, 294 N. Y. 361, 62 N. E. 2d 604, 606 (1945); *Kelso* v. *City of Tacoma*, 63 Wash. 2d 913, 390 P. 2d 2, 5 (1964); *Perkins* v. *State*, 252 Ind. 549,251 N. E. 2d 30, 34 (1969); Vanlandingham, *Local Governmental Immunity Re-Examined*, 61 Northwestern L. Rev. 237, 253-254, 262 (1966). However, the court rejected that contention (C. A. at 13a-14a) and on February 17, 1972, the District of Columbia Court of Appeals made a similar ruling in *Graves* v. *District of Columbia*, —— A. 2d —— (D. C. App. No. 5086), with Judge Nebeker dissenting. A petition for rehearing en banc is being prepared for filing in *Graves*.

District of Columgia amenable to an action for damages in the United States District Court for the District of Columbia under R. S. § 1979, should be reversed.

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IN THE

Supreme Court of the United States

Term 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

In reversing the District Court's dismissal of the plaintiff's claim against the District of Columbia under 42 U.S.C. §1983, the Circuit Court distinguished this Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961) on the grounds that (a) the *Monroe* rationale is inapplicable to municipalities which can be sued under local law and (b) that the District of Columbia, as a creation of Congress, is uniquely

within the power of Congress to regulate, and the problems of federalism arising from the imposition of liability on state political subdivisions are therefore irrelevant.

While agreeing that *Monroe* may be thus distinguished, respondent nevertheless urges that it is appropriate to re-examine the *Monroe* holding, and the legislative history on which it rests.

Close analysis of the legislative history of § 1983 does not support the conclusion reached in *Monroe* that municipal corporations are not "persons" within the meaning of that section. The Sherman Amendment debates, which were the sole legislative history relied upon, were concerned only with municipal liability for riot damage and had nothing whatever to do with the question of whether municipalities should be liable, either directly or vicariously, for constitutional deprivations by municipal officials.

In the decade since *Monroe*, its broad holding excluding cities from coverage under § 1983 has been the subject of growing criticism among legal commentators and widespread circumvention by various lower courts, and – at least implicitly – by this Court. The viability of the *Monroe* holding has been substantially eroded by the several circuits which have sought to implement the objectives of the Civil Rights Act by awarding equitable relief under § 1983 against cities and other state subdivisions, even where such equitable relief has carried substantial monetary consequences.

The concept of municipal immunity has been widely discredited in recent years and runs counter to the notions of equal protection and due process. Immunity for police misconduct is particularly insupportable since it is only through municipal liability that the twin objectives of deterrence of unconstitutional behavior and compensation for

its occurrence can realistically be achieved. Relevant studies have found that police misconduct, with attendant deprivation of constitutional rights, continues to be a serious problem in the United States, and existing mechanisms and procedures for coping with the problem have proved inadequate. Thus, urgent and compelling considerations of public policy afford further grounds for a reconsideration of *Monroe.*

Should the Court decline to re-examine its holding in *Monroe* at this time, the decision of the Circuit Court should nevertheless be affirmed. The legislative history of the Sherman Amendment, upon which this Court's decision was predicated, makes it clear that the primary concern of the opponents of that Amendment was the fear of imposing liability on state entities which were not financially equipped to cope with such liability – a consideration plainly inapplicable to cities whose immunity has been abrogated under local law. Further support for incorporation of local law abrogating immunity is found in 42 U.S.C. § 1988, which operates to "borrow" local state law where necessary to effectuate the purposes of the Civil Rights Act. Under local law, the District of Columbia may be held liable in damages, either directly or vicariously, for injuries arising from the tortious conduct of its police officers.

Finally, the rationale of the Sherman Amendment opposition is inapplicable to the District of Columbia. The problems of federalism and encroachment upon the rights and prerogatives of the sovereign states which concerned the Congress in 1871 have no relevance to the District of Columbia, which is itself a creature of Congress, and over whose finances and other affairs Congress exercises primary authority. The uniqueness of the District's position is further shown in the fact that the same Congress which enacted § 1983 had, less than two months earlier, constituted

the District of Columbia as a corporate body which could sue and be sued.

I. *MONROE v. PAPE*, INSOFAR AS IT HOLDS THAT A CITY IS NOT A PERSON WITHIN THE MEANING OF § 1983, SHOULD BE REVERSED.

A. The Legislative History of § 1983 is Entirely Consistent with the Concept of Municipal Liability for the Acts of Municipal Employees.

In *Monroe v. Pape*, 365 U.S. 167, 191 (1961) this Court held that "a municipal corporation is not a 'person' within the meaning of Section 1983." Mr. Justice Douglas rejected as merely permissive the language of another statute passed the same year which provided, under the heading "Rules for the Construction" of Acts of Congress, that "the word 'person' *may* extend and be applied to bodies politic and corporate." Act of February 25, 1871, ch. 71, § 2, 16 Stat. 431 (emphasis added).[1]

While permissive definitions usually invite such analysis, the Court explicitly stated that it did not reach the policy considerations which might be marshalled for and against municipal liability. Instead the Court relied on what it deemed to be the relevant portions of the legislative history of the Civil Rights Act. Closer anlaysis of that history does not support the Court's conclusion, but points, rather, to a contrary result.[2]

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[1] It is probable that Congress intended to include as a "person" the District of Columbia – a "body corporate" which it had created only four days earlier. See p. 48, *infra*.

[2] Kates and Kouba, "Liability of Public Entities Under Section 1983 of the Civil Rights Act," 45 S.Cal.L.Rev. 131, 134-136, 157-161 (Cont'd.)

The *Monroe* Court's analysis of legislative history focused not on debate directly relating to Section 1983, but on Congressional rejection of the Sherman Amendment to Section 1983.[3] This amendment would in certain circumstances

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Ftn. 2 (Cont'd.)
(1972); Note, "Developing Governmental Liability Under 42 U.S.C. §1983," 55 Minn.L.Rev. 1201 (1971). Comment, "Suing Public Entities Under the Civil Rights Act: *Monroe v. Pape* Reconsidered," 43 U. Colo. L. Rev. 105 (1971).

[3] *Cong. Globe*, 42nd Cong., 1st Sess. 704-705, 725, 800-801 (1871). As originally passed by the Senate, the amendment reads:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising any such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish; and execution may be issued on a judgment rendered in such suit, and may be levied upon any property, real or personal, of any person in said county, city, or parish; and the

(Cont'd.)

have imposed damage liability, similar to the "riot liability" long known to the English law and reflected in the law of

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Ftn. 3 (Cont'd.)

> said county, city, or parish may recover the full amount of said judgment, cost, and interest from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction.

Cong. Globe, 42d Cong., 1st Sess. 704 (1871). Although amended in conference, few substantive changes were made in the first portion of the provision. In addition to adding an explicit requirement of intent and making several minor word changes, the revised Sherman Amendment contained additional language recognizing the liability of the municipality only after the judgment was not satisfied by the actual wrongdoers:

> [A]ny payment of any judgment, or part thereof, unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be abrogated to all the plaintiff's rights under such judgment.

Id. at 749.

some states, upon any city or county in which citizens or their property were injured in civil disturbances. Though twice passed in slightly different forms by the Senate, the Sherman Amendment was twice rejected by the House of Representatives, and eventually dropped. It was on the basis of the debates over the Sherman Amendment that Mr. Justice Douglas inferred that the congressional response to the proposal for municipal liability "was so antagonistic that we cannot believe that the word 'person' was used in this particular act to include them [municipalities]." 365 U.S. at 191. The proponents of the Sherman Amendment analogized it to the ancient "riot acts" of English law, under which local communities were liable for riot damage. *Cong. Globe*, 42d Cong., 1st Sess. 705, 751-52 (1871) (remarks of Sen. Sherman, Rep. Shellaburger) [hereafter cited *Cong. Globe*]. Opponents of the amendment pointed out, however, that under early English law, all members of the community were responsible to join the "hue and cry" against any wrongdoers. Since the members of the community thus had the duty, and presumably the power, to prevent and contain civil disturbances, it was reasonable to impose liability for their failure to do so. *Cong. Globe*, 788, 794 (remarks of Reps. Kerr and Poland). Under American law, the opponents pointed out, local governments enjoyed only the power conferred upon them by the state. Accordingly, in many cases municipalities simply did not have the authority to prevent the civil disturbances to which the amendment was addressed. *Cong. Globe*, 757, 762, 791, 799 (remarks of Sens. Conkling and Stevenson, Reps. Willard and Farnsworth).[4]

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[4] It was pointed out that, in fact, only the largest cities maintained regular police departments in 1871; smaller cities and towns simply did not have police forces to quell civil disturbances. *Cong. Globe* at 765 (remarks of Sen. Casserly); see, also *President's Commission on Law Enforcement: Task Force Report, The Police, The History of the Police* 5 (1967).

In effect, these critics charged, the Sherman Amendment would therefore either punish municipalities for disturbances which they had no means to prevent, or would – in derogation of the state's power to determine the authority of municipalities – compel local governments to maintain police forces. *Cong. Globe* at 765, 795 (remarks of Sen. Casserly, Rep. Blair). Accordingly, in view of the enormous potential liability for civil disturbances, opponents of the Sherman Amendment were led to dire predictions that municipalities would be bankrupted, were the amendment adopted. *Cong. Globe*, 763, 772, 799 (remarks of Sen. Casserly, Rep. Smith).

The Sherman Amendment was not designed to impose liability on a municipality for misconduct by its agents. It was aimed at imposing municipal liability for the failure to prevent or contain private acts of violence or harm. Therefore, the congressional renunciation of the Amendment meant that a community could not be liable for purely private acts, acts which it lacked a state-conferred power or duty to prevent. The fact that the Sherman Amendment talks only about damages from the actions of persons "riotously and tumultuously assembled together" suggests that the proponents of the Amendment assumed that liability for the acts of public officials was already covered by Section 1983 itself. In this regard, it is crucial to note that even the opponents of the Sherman Amendment conceded that civil liability would be appropriate when the community "has proved faithless to its duties." *Cong. Globe* at 790 (remarks of Rep. Willard).[5]

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[5] See also pp. 36-37, *infra*, particularly the quote remarks of Rep. Poland and Rep. Burchard.

B. The *Monroe* Holding Has Been Seriously Eroded by the Many Cases Granting Equitable Relief Against Cities Under § 1983.

If, as this Court stated in *Monroe*, a municipal corporation is not a "person" within the meaning of § 1983, it necessarily follows that no action – legal or equitable – may be brought against a city under that statute. The fact is, however, that in the decade since *Monroe* a growing number of lower courts have explicitly declared that actions against cities will lie under § 1983 for the obtaining of equitable relief, even where the equitable relief is accompanied by monetary awards.[6] These cases manifest a significant judicial disaffection for the *Monroe* rule by strictly limiting its application. This Court has shown no inclination to stem this tide and to give the *Monroe* holding expansive effect, although it has had opportunity to do so.

In *Adams v. City of Parkridge*, 293 F.2d 585 (1961) the Seventh Circuit expressly limited the *Monroe* holding to barring actions for damages, and enjoined under § 1983 the enforcement of a municipal ordinance limiting charitable solicitations. Similar holdings granting equitable relief against cities under § 1983 have been made by four circuit courts.[7]

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[6] Cf. Note, "A Municipal Corporation May be Sued Under the Civil Rights Act for Equitable Relief," 70 Colum. L. Rev. 1467 (1970); Comment, "Injunctive Relief Against Municipalities Under Section 1983," 119 U. Pa. L. Rev. 389 (1970).

[7] Fourth Circuit: *Garren v. City of Winston-Salem*, 439 F.2d 140 (1971);

Fifth Circuit: *Harkless v. Sweeny Independent School District*, 427 F.2d 319, *cert. den.* 400 U.S. 991 (1971); *Butts v. Dallas Independent School District*, 436 F.2d 728 (1971);

(Cont'd.)

In *Harkless v. Sweeny Indep. School District*, 427 F.2d 319 (5th Cir.) *cert. den.* 400 U.S. 991 (1971), the plaintiffs were ten Black school teachers seeking reinstatement and back pay as a result of the school district's failure to renew their contract when the school system desegregated. The district court granted the defendant's motion to dismiss, relying upon the holding in *Monroe* that a city was not a "person" within the meaning of § 1983.

On appeal, the circuit court reversed and limited the application of *Monroe* to barring damage claims under *respondeat superior* against cities. *Monroe* thus was held to impose no obstacle to claims against municipalities for equitable relief. The court went on to hold that plaintiffs, under the rubric of seeking equitable relief, could obtain back pay as well. This Court denied *certiorari*, although it is difficult to view the case as anything but a clear departure from the holding and rationale of *Monroe*.

The *Monroe* holding has been further eroded by those cases in which various non-municipal public entities have been held subject to suit under § 1983. In *Scher v. Board of Education of Town of West Orange*, 424 F.2d 741 (3rd Cir. 1970) the Board of Education was held to be potentially liable in damages, as an entity distinct from the town itself, even though the claim that this was really a suit against the city, precluded by *Monroe v. Pape*, was

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Ftn. 7 (Cont'd.)

Seventh Circuit: *Adams v. City of Parkridge, supra; Schnell v. Chicago*, 407 F.2d 1084 (1969);

Tenth Circuit; *Daily v. City of Lawton, Okalhoma*, 425 F.2d 1037 (1970).

See also, *Sims v. Jurus*, 313 F. Supp. 1212 (D. Ore. 1969); contra *Rosatto v. Wyman*, 414 F.2d 170 (2d Cir. 1969); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Deane Hill Country Club v. Knowville*, 379 F.2d 321 (6th Cir. 1967).

presented to the Court. The validity of this distinction is difficult to accept, since in the instant case such a rule would have permitted a suit against the police department consequences. A similar result was achieved in *Smith v. Board of Education of Morrillton School District No. 32*, 365 F.2d 770 (1966) (opinion by Blackmun, J.), where damages were held to be recoverable against the defendant school board under § 1983.

In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), an action under § 1983 for injunctive relief and nominal damages against the defendant school district, this Court, without reference to *Monroe*, reversed and remanded for further proceedings "expressing] no opinion on the form of relief which should be granted." 393 U.S. at 514.

C. The Doctrine of Sovereign Immunity Is an Exception-Riddled Anachronism With No Rational Basis, Whose Application Denies Due Process and Equal Protection.

It is a profound enigma of the law how a doctrine based on the maxim "The King can do no wrong" became entrenched in the judicial system of a nation whose very birth is the maxim's refutation.[8] Tracing the doctrine's development in American jurisprudence, far from

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[8] *Evans v. Board of County Comm'rs. of the County of El Paso*, 482 P.2d 968, 969 (Colo. 1971); *Hargrove v. Town of Cocoa Beach*, 96 So.2nd 130, 132 (Fla.) (1957).

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds

(Cont'd.)

solving the mystery, compounds the confusion.[9] It is not surprising, therefore, that a consistent stream of scholarly criticism[10] has turned in recent years to a torrent of legislative and judicial retreat.[11]

Ftn. 8 (Cont'd.)

upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 469 (1897).

[9] See brief for *Amicus Curiae*, p. 21, *et seq.*, *Graves v. D.C.*, 287 A. 2nd 524 for an excellent historical analysis

[10] Price and Smith, "Municipal Tort Liability: A Continuing Enigma," 6 Fla. L. Rev. 330 (1953); Bernstein, "Governmental Tort Liability and Immunity in Wisconsin," 1961 Wisc. L. Rev. 486; Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L. Q. 28 (1921); Jaffe, "Suits Against Government and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1 (1963); Borchard, "Government Liability in Tort, Parts I-III," 34 Yale L.J. 1, 129, 229 (1924-25); Parts IV-VI, 36 Yale L. J. 757, 1039 (1926-1927).

[11] State and municipal immunity have in recent years been partially or wholly abrogated by statute or judicial decision in the following jurisdictions: (Cont'd.)

As between the innocent victim of a policeman's billy club and the community which puts the policeman on the street – perhaps inadequately trained or supervised – there

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Ftn. 11 (cont'd)

Alabama: *City of Foley v. Terry*, 278 Ala. 30, 175 So. 2d 461 (1965).

Alaska: Alaska Stat. §09.65.070 (1962).

Arizona: *Stone v. Arizona Highway Commission*, 93 Ariz. 384, P.2d 107 (1963).

California: *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Reptr. 1189, 359 P.2d 457 (1961), modified *sub. nom. Corning Hospital District v. Superior Court of Tehama Co.*, 57 Cal. 2d 488, 20 Cal. Reptr. 621 370 P.2d 325 (1962); Cal. Govt Code §§815.2, 818 (1966).

Colorado: *Evans b. Board of County Comm'rs of County of El Paso*, 482 P.2d 968 (Colo. 1971).

Connecticut: *Murphy v. Ives*, 151 Conn. 259, 196 A.2d 596 (1963).

Florida: *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1960).

Hawaii: Hawaii Rev. Stat. 662-1(2) (1968).

Illinois: Smith-Hurd Ill. Ann. Stat. Ch. 85 §2-109 (1965).

Indiana: *Brinkman v. City of Indianapolis*, 231 N.E. 2d 169 (1967).

Iowa: Iowa Code Annotated §§225(a)(1) - (a)(20)(1967).

Kansas: *Daniels v. Kansas Hwy. Patrol*, 206 Kan. 710, 482 P.2d 46 (1971).

Kentucky: *Haney v. Lexington*, 386 S.W.2d 738 (Ky, 1964).

Michigan: *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d L (1961).

Minnesota: Minn. Stat. §§446.01-.15 (1969).

New Jersey: *McAndrew v. Mularchuck*, 33 N.J. 172, 162 A.2d 820 (1960).

Nebraska: *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W. 2d 805 (1969) Rev. Stat. Neb. §23-2409(2) (1970).

Nevada: Nev. Revised Stat. §41.031 (1968).

New York: New York Ct. Cl. Act §8 (1963).

North Carolina: N.C. Gen. Stat. §§143-291, 300.1 (1964).

Ohio: *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E. 2d 321 (1971).

Oklahoma: Okla. Stat. Ann. §1753 (1965).

(Cont'd.)

can be little doubt as to which party ought more equitably to bear the loss.[12] This factor was explicitly recognized in the court below:

> . . . Despite the best efforts of those in authority, policemen will at times use excessive force or attack people without lawful cause. Those wronged are not wronged by the policemen alone or even chiefly, and not by the supervisor merely because he has failed to give

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Ftn. 11 (Cont'd.)
Oregon: *Ore. Rev. Stat.* §30.260 *et seq.* (1967).
Rhode Island: *Becker v. Beaudoin*, 261 A.2d 896 (R.I. 1970).
Virginia: Va. Code Ann. §8-42.1 (1970); *Markham v. Newport News*, 292 F.2d 711 (4th Cir. 1961).
Washington: Wash Rev. Code §4.92.010-4.96.020 (1970).
Wisconsin: *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

In the following, states and municipalities may be liable for the torts of their officials to the extent that the municipalities have insurance:

Delaware: *Del. Code Ann.* title 18 §6509 (1971 Supp.).
Idaho: Idaho Code Ann. §41-3505 (1961).
Missouri: Mo. Stat. Ann. §71.185 (1970).
Montana: Mont. Rev. Code title 83 Ch. 7, 83-701 (1961).
New Hampshire: N.H. Rev. Stat. Ann. §412.3 (1968).
New Mexico: N.M. Stat. Ann. §5-6-20 (1966).
North Dakota: N.D. Cent. Code §40-43-07 (1968).
Vermont: Vt. Stat. Ann. Tit. 29, §1403 (1970).
Wyoming: Wyo. Stat. Ann. §15.1-4 (1965).

12 "Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer." Burger, Chief Justice (then Circuit Judge), "Who Will Watch the Watchmen," 14 Amer. U. L. R. 1, 14 (1964).

> the very best training and instruction. It is the municipality which employs the policemen, because it knows of no other way to hold the forces of evil in check, and has failed to diminish them or remove the causes that bring them into being, with any real effectiveness. Thus it appears very unjust for a citizen, injured in such an encounter, to have to look for redress only to a patrolman who maybe cannot even be served with process, like Carlson here, or is judgment-proof. It is not much more satisfactory if he can sue supervisory officials who most likely were doing everything possible according to their lights to avert the evil that occurred. The municipality which arms and uniforms an untrained person and puts him on the streets without need, in anything short of a desperate emergency, has committed a grievious wrong. C.A. p. 30a (concurring opinion of Nichols, J.)

Given the further fact that most victims of police brutality are found in the lower socio-economic strata, it becomes inherently unfair to expect these victims to endure the financial losses which frequently attend police misconduct. Neither can these persons be expected to protect themselves by insurance. Uniform municipal liability for police misconduct would result in spreading the risk of loss so thinly that no citizen would run the hazard of financial disaster.

Justice (then Judge) Cardozo once said, "A right of action is property." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110, 120 N.E. 198, 201 (1918). It thus follows that

any arbitrary denial of a right of action is a deprivation of property without due process. While there may be situations in which shielding governments from liability is appropriate in achieving some rational, constitutionally inoffensive goal, presumptive governmental immunity denies due process, which requires instead presumptive government accountability from which lawful exceptions could then be carved.

If governmental conduct results in financial loss to a citizen, the denial of effective legal redress leaves that loss uncompensated, resulting in a taking of property. And again, if the reasons for the denial are capricious, due process requirements have not been met.[13]

Sovereign immunity invidiously discriminates among citizens. It treats differently, with no rational basis for distinction, citizens injured by private conduct from citizens injured by state action. Thus the doctrine is contrary to the Equal Protection and Due Process clauses of the

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13 "The immunity theory has been further supported with the idea that it is better for an individual to suffer a grievious wrong than to impose liability on the people vicariously through their government. If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported." *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957).

Fourteenth Amendment[14] and the Due Process clause of the Fifth Amendment.[15]

No federal court has ever held that sovereign immunity violated due process. As Mr. Justice Frankfurter observed, however, " 'Due process' is, perhaps the least frozen concept of our law – the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956).

This Court has on several occasions been responsive to the kinetics of history and experience in illuminating the need for changing previously formulated conceptions of due process. Twenty-one years after *Betts v. Brady*, 316 U.S. 455 (1942), held that due process did not compel the right to counsel in every criminal case, *Gideon v.*

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[14] This was precisely the holding of the Court in *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971). *See, also Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Baker v. Carr*, 369 U.S. 186 (1962).

It is clear that a municipality may not with impunity violate 14th Amendment rights:

> . . . although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a state's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the state. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. *Avery v. Midland County*, 390 U.S. 474, 480 (1968).

[15] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Wainwright, 372 U.S. 335 (1963) specifically rejected that holding. *Malloy v. Hogan*, 378 U.S. 1 (1964) overruled *Twining v. New Jersey*, 211 U.S. 78 (1908), holding that the right against self-incrimination was indeed an element of Fourteenth Amendment due process. More recently, in *Benton v. Maryland*, 395 U.S. 784 (1969), this Court finally held that the prohibition against double jeopardy was a necessary element of due process, overruling *Palko v. Connecticut*, 302 U.S. 319 (1937).

Of most significance to this case is the *Mapp v. Ohio*, 367 U.S. 643 (1961) departure from *Wolf v. Colorado*, 338 U.S. 25 (1949). In *Mapp* the Court held that the exclusionary rule delineated in *Weeks v. United States*, 232 U.S. 383 (1914), was encompassed within the Fourteenth Amendment's due process requirements. Analyzing due process conceptions born in *Weeks* and *Mapp* compels the conclusion that sovereign immunity, particularly for police misconduct, runs afoul of those conceptions.

D. Governmental Liability is the Only Effective Method of Compensating For and Deterring Police Misconduct.

In this section respondent will show that (1) police misconduct continues to be a problem of major dimensions, especially in large urban centers; (2) existing procedures and institutions other than municipal civil liability are ineffective in controlling police misconduct; and (3) municipal liability and damages under § 1983 are essential to providing an effective and orderly remedy for police excesses.

1. Police Misconduct Is a Serious Obstacle to Effective Law Enforcement in the United States.

In the same year that Monroe was decided by this Court, the U.S. Civil Rights Commission concluded that "police

brutality is still a serious problem in the United States."[16] There is little reason to believe that the situation has improved.

A study undertaken by the President's Commission on Law Enforcement and the Administration of Justice in 1966 found that physical abuse and excessive use of force by police officers continued to be a significant problem in large metropolitan areas of the country. One arm of the Commission, the President's Task Force on the Police, concluded as follows:

> Although many allegations of police misconduct or discriminatory treatment are unwarranted, the Commission's surveys reveal that police practices exist which cannot be justified. For example, the Commission found that abusive treatment of minority groups and the poor continues to occur. Many established police policies – such as the use of arrests for investigative purposes – alienate the community and have no legal basis. Departments may utilize procedures, such as the use of dogs to control crowds, without balancing the potential harm to police-community relations and some valuable law enforcement techniques, like field interrogation, are frequently abused to the detriment of community relations. Too few departments give necessary guidance to assist their personnel

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16 "The 50 States Report," submitted to the Commission on Civil Rights by the State Advisory Committees, 1961 (Washington, U.S. Government Printing Office, 1961).

> in resolving potentially explosive social and criminal problems . . .
>
> Unjustified use of force, like verbal abuse, cannot be tolerated in law enforcement. Many persons, and particularly those from minority groups believe that police officers sometimes or even frequently engage in excessive or unnecessary physical force. The Commission was not able to determine the extent of physical abuse by policemen in this country since recent studies have generally not been systematic. Earlier studies, however, have found that police brutality was a significant problem. For example, the National Commission on Law Observance and Enforcement (the Wickersham Commission) which reported to President Hoover in 1931, found considerable evidence of police brutality. The President's Commission on Civil Rights, appointed by President Truman made a similar finding in 1947. The President's Task Force on the Police, *supra*, pp. 178-181.

One item of evidence utilized by the President's Task Force on the Police was an 11-month study conducted by the University of Michigan under a grant from the U.S. Department of Justice. The 1965 study was an attempt to estimate the amount of police mistreatment by actual observation of police contact with citizens. Some of the questions the study was designed to answer were: How widespread is police misconduct, and is it on the rise? Why do policemen mistreat citizens? To find some answers, 36 investigators for the Center of Research on Social

Organization observed police-citizen encounters in Boston, Chicago, and Washington, D.C. The investigators accompanied police officers on routine patrols over a period of several months. The results of the study indicated that 27% of the police operating in the ghetto sections of these three cities were seen or admitted to engaging in misconduct of one kind or another. The study's conclusion would also suggest that physical brutality is frequent. The Commission's task force observers accompanying police observed 20 acts of clear brutality during 850 8-hour patrols. President's Task Force on the Police, *supra*, p. 182.[17]

The President's Task Force also found arrests for harassment to be prevalent in many areas, citing studies conducted in Detroit and Cleveland which found the practice of arrests without probable cause to keep "undesirable"

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[17] See, A Police Department In Trouble: Racial Discrimination and Misconduct in the Police Department of Washington, D.C. (report and recommendations of the National Capital Area Civil Liberties Union, August 1, 1968) (hereinafter referred to as NCACLU Report). The NCACLU Report indicates the significance of this statistic by computing that in Washington, D.C. with a police force at the time of the report of 2800 men, there are 700-800 8-hr. patrols per day. By projecting the figures, one arrives at a total of 15 acts of brutality every day, or over 5,000 per year. The size of the police force has almost doubled since then. "It must also be kept in mind that these acts of unwarranted and excessive violence were committed by the police while they knew they were under observation by Crime Commission investigators and it may be assumed that they exercised more restraint than they would have exercised if they had not been under observation." NCACLU Report, p. 9.

persons off the streets to be prevalent in certain areas of activity (gambling, prostitution, etc.).[18]

A recent suit in the District of Columbia revealed that the Metropolitan Police engaged in a pattern of arresting and detaining underground newspaper vendors without legal authority, in violation of their First Amendment rights. *Washington Free Community, Inc. v. Wilson*, No. 71-2008, (presently pending in the United States Court of Appeals for the District of Columbia Circuit). The evidence at trial from 18 witnesses indicated approximately 750 instances of vendor harassment over a three-year period.

It is perhaps appropriate to conclude this section on police misconduct with the observation of one writer on the effects of official lawlessness:

> More and more citizens are coming to disbelieve the promise of justice and are turning to violent dissent, advocacy of unconstitutional repression or mindless lawlessness. They no longer believe that the system will

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[18] Task Force on the Police, *supra*, p. 186. *Cf. Smith v. Florida*, 40 U.S.L. Week 4221 (U.S. Feb. 22, 1972); *Papachristou v. City of Jacksonville*, 40 U.S.L. Week 4216 (U.S. Feb. 22, 1972); *Ricks v. District of Columbia*, 134 U.S. App. D.C. 201, 414 F.2d 1097 (1968); *Gomez v. Wilson*, 139 U.S. App. D.C. 122, 430 F.2d 495 (1970); *Gomez v. Layton*, 129 U.S. App. D.C. 289, 394 F.2d 764 (1968).

"Frequent instances of arrests, many unjustified, under the 'failure to move on' provision of the disorderly conduct statute have resulted from a lack of understanding on the part of both citizens and officers as to when this provision may properly be invoked." *Report of the President's Commission on Crime in the District of Columbia*, p. 208 (1966).

eventually work for them. They no longer have faith in the rule of law.[19]

2. Existing Procedures and Institutions for Controlling Policemen's Conduct Are Ineffective.

Although police brutality and misconduct have existed for decades, no adequate official response has been forthcoming. While internal and external controls have been attempted, the current approaches neither work nor show promise of working.

Ideally, of course, the best way to deal with police misconduct is to prevent it from happening initially through the use of effective methods of personnel screening, sufficient training, constant retraining, and supervision. But, failing that,[20] the question becomes how complaints should be handled.

a. Internal Review.

Most large police departments now have procedures of some kind which are supposed to deal with charges of

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19 Downie, *Justice Denied: The Case for Reform of the Courts*, p. 18 (Praeger 1971).

20 "The basic training of a policeman is rarely adequate to make him understand what he can and cannot do in all situations; it is unlikely that without some special effort and outside help he will ever understand what he did wrong in a given case." Mr. Chief Justice (then Circuit Judge) Burger, "Who Will Watch the Watchmen," 14 Amer. U. L. Rev. 1, 11 (1964). "But no effective mechanisms of communication to inform and educate police exist in any real sense in metropolitan police departments." *Id.* at 12.

misconduct by their members, whether those charges originate inside or outside of the department. Internal investigations, conducted properly, can provide important information about the conduct of individual officers. At p. 194, the President's Task Force on the Police notes:

> The internal investigation units should be just as diligent in sampling the conduct of its officers and ferreting out misconduct against citizens as in ferreting out corruption. For example, they should be willing to observe police conduct on the street, to have men in station houses to determine whether physical abuse occurs, and to utilize other promising investigative techniques . . .
>
> Policemen all too often, because of misplaced loyalty, overlook serious misconduct by other officers. This has relevance to community relations as well as corruption. The Michigan State survey indicates that there is seldom any established procedure to accommodate the complaint of one officer against another and that 'nearly every organization contacted made it extremely difficult to inform higher officials of improper conduct on the part of his fellow officers or his supervisors.

Studies of the informal codes within police departments cast considerable doubt on the effectiveness of internal investigation involving the complaint by one officer of improper performance of duties by another officer.[21]

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[21] The research conducted by Professor Albert Reiss for the Task Force on the Police showed that in more than one-half of all instances

(Cont'd)

b. Citizen Complaints.

The President's Task Force on the Police reported that the police actively discourage the filing of citizens' complaints and retaliate against complainants.

> Although some departments have recognized the vital role that a good complaint procedure can play in police administration, too few forces today have adequate procedures for dealing with complaints. . . . Although some of the reasons for distrust are unjustified,

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Fin. 21 (Cont'd.)
of undue force, at least one other policeman was present who did not participate in the use of force but who also did not report it. The study showed that "for the most part, the police do not restrain their fellow policemen. On the contrary, there were times when their very presence encouraged the use of force." Reiss, "Police Brutality – Answers to Key Questions." *Transaction*, p. 18 (July/August 1968). Professor of Sociology Ellwyn R. Stoddard contends that illegal practices of police personnel are socially prescribed and patterned through the informal "code" rather than being a function of individual aberration or personal inadequacies of the policemen. He cites as an example the use of "illegal" violence by policemen, which is justified as a necessary means to locate and harass criminals. These procedures are reinforced through coordinated group action.

> "The officer needs the support of his fellow officers in dangerous situations and when he resorts to practices of questionable legality. Therefore, the rookie must pass the test of loyalty to the code of secrecy. Sometimes his loyalty to colleagues has the effect of protecting the law violating, unethical officer." Stoddard, 59 *J. Crim. L., C. & P.S.*, 138, 143 (1968).

there is a basis for the feeling that many departments have adopted procedures which discourage rather than encourage the filing of complaints and which are unfair either to the complainant or to the officer complained against. Unfortunately, police officers and departments often regard a citizen complaint as an attack on the police as a whole rather than a complaint against an individual officer, and therefore, attempt to discourage citizens from filing them. The discouraging of citizen complaints not only deprives the department of valuable information, but also convinces the public that the kinds of practices complained about are condoned or even expected.

Several methods of discouraging complaints have been practiced in the past. In one large eastern city, for example, [Washington, D.C.] the police department used to charge many of those who filed complaints of police misconduct with filing false reports with the police. In 1962, 16 of 41 persons (almost 40%) who filed complaints were arrested for filing false charges, in comparison with the arrest of only 104 of 33,593 persons (0.3%) who filed similar charges against private citizens. Officers sometimes told prospective complainants that all statements must be made under oath and that they could be charged with false reporting. Such a statement is apt to discourage complaints whether or not such charges are actually filed. Task Force on the Police, *supra*, pp. 194-195.

Furthermore, once a citizen makes an effort to complain, the mechanics of receiving complaints often tend to discourage a potential complainant from taking any action. Some police departments employ procedures which are so fragmented or complex, that the ordinary citizen either gives up or never tries in the first place. On the other hand, other departments employ procedures which are completely haphazard. The Task Force Report disclosed the surprising fact that 75% of police departments have no formal complaint requirements at all (The President's Task Force on the Police, *supra*, p. 195).

The President's Task Force Report discloses survey results showing that although 90% of the police departments surveyed require an investigation of all citizen complaints, many forces do not have a designated special unit for doing so.[22] The existence of such a unit, however, is no guarantee of efficient, objective investigations of complaints. The NCACLU Report disclosed that the Metropolitan Police Department's Internal Investigations Division took between 3-6 months to investigate a case and report to the Chief of Police. It also found that the investigations were extremely biased in favor of the accused officer. The investigative reports generally accepted the version given by the accused police officers and other police witnesses. The NCACLU Report concluded that no system for processing citizens' complaints against the

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[22] The surveys found that in departments without internal investigations units, where investigations were conducted by the line unit involved, they were often haphazard and dependent on the particular line commander; an independent objective investigation was more difficult to obtain, and even if this was accomplished, suspicion of the result was more likely. The President's Task Force on the Police, *supra*, at 195-196.

police could be satisfactory as long as it depended upon the investigation being conducted by the police department itself.[23]

The survey findings disclosed by the report of the President's Task Force on the Police provide little hope of fair and impartial resolution of complaints. The number of complaints sustained compared to the number originally filed is amzingly low.[24]

> Police complaint investigative procedures in most departments must be substantially improved to obtain results which are just to all the parties and give the appearance of fairness. At present, the procedures in most departments have many deficiencies. For example, a study by the Harvard Law Review in 1963 found that 70% of police departments surveyed had no formal hearings even for serious complaints; almost half with hearings held them in secret; the complainant could not examine witnesses in 20%; he was entitled to the department's investigative

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[23] NCACLU Report, p. 16.

[24] The President's Task Force on the Police, *supra*, at 196. The NCACLU Report also found the police trial board to be the weakest link in the chain of processing complaints against the police. The Report concluded that "whatever the other deficiencies in the system, the most glaring abuse is that perpetrated by the trial boards. The record of these boards in Washington, D.C. shows almost consistent cover-up or minimizing of police abuses, and a pattern of discrimination against Negro police officers brought before trial boards on internal disciplinary matters." NCACLU Report, p. 16.

> report in only 5%; and in 20%, the complainant and officer were not entitled to the assistance of counsel. The Michigan State survey found that the trial board in one city is ineffective because of the lack of subpoena power; that in many cities the secrecy of trial boards leads to public distrust; that the denial to complainants of a right to a hearing or, if one is held, to present witnesses or to testify themselves, produces charges of unfairness; and that organizational and procedural complexity, the lack of information given to the public, and lack of supervision of police personnel discourages many complaints.
> The President's Task Force on the Police, *supra*, p. 196.

c. External Avenues of Redress.

In all jurisdictions, if a complainant remains dissatisfied with the internal disposition of a case, there are other avenues to pursue his claim outside the police agency, *i.e.*, the local prosecutor, the courts, civilian review boards, etc. The President's Task Force on the Police found that, while the institutions listed above have procedures for processing citizen grievances about the conduct of police officers, they are frequently too formal, awesome, expensive, or geographically far-removed from the often bewildered citizen. Task Force Report, p. 198. Furthermore, some of them lack the machinery or resources to process grievances properly.

i) Criminal Law.

The relevance of the criminal law to police-community relations is limited by many factors. The Task Force on the Police found that many prosecutors are reluctant to bring charges except in the most serious and irrefutable cases because they work so closely with the police. Even apart from criminal prosecutions of police, the criminal law could play a significant part in police discipline since frequently criminal prosecutions of non-police defendants result in findings of police misconduct justifying suppression. Rarely does such a finding provoke disciplinary action against the police officer.[26]

ii) Civilian Review Boards.

As the result of citizen dissatisfaction with police internal review porcedures, civil review boards were created in several large cities. While the boards which have gone into operation differ somewhat in organization and detail, their basic concept has been the same. They have been advisory only, having no power to decide cases. The President's Task Force Report noted that the boards of

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[25] The President's Task Force on the Police Report, p. 198. The NCACLU Report of 1968 reported that the Office of the U.S. Attorney has, with rare exception, failed and refused vigorously to prosecute police officers in the District of Columbia against whom there was clear evidence of serious crime. NCACLU Report, p. 22.

[26] "I am informed by experts that a policeman is rarely disciplined for action declared illegal by a court as a basis for suppression." Burger, Chief Justice, then Circuit Judge, "Who Will Watch the Watchmen," 14 Amer. U.L. Rev. 1, 11 (1964).

New York City and Washington, D.C. even lacked the power to indicate their views on the merits of the case under consideration, being limited to recommending whether a police trial was necessary or not. The President's Task Force on the Police, p. 200.[27] The President's Task Force found that civilian review boards have many of the same weaknesses which exist in internal police machinery in many departments.[28] Many problems were found to be due to a lack of staff and delays in receiving reports from police departments. Citizens have had difficulty in obtaining complaint forms, the procedures of the boards have not been widely known, and the boards have been slow in their determination of cases.[29]

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[27] With reference to the complaint review board of Washington, D.C., it is noted that the Board only comes into play when the Chief of Police makes an initial decision that a citizen complaint does not merit administrative prosecution. (NCACLU Report of 1968, p. 9). If the Chief decides that the complaint does merit prosecution, he sends the case directly to a trial board, and the complaint review board never comes into operation. A serious defect of the Washington board, as reported by the study, was that there was no independent investigative staff, the board relying solely on the investigative file provided by the police department.

[28] The potential advantages and weaknesses inherent in civilian review boards have been the subject of considerable legal scholarship, *e.g.*, Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority," 58 J. Crim. L., C. & P.S. 160 (1967); Locke, "Police Brutality and Civilian Review Boards," 44 J. Urban L. Rev., "2 Crim. L. Bull. 3 (October, 1966); Neier, "Civilian Review Boards – Another View," 2 Crim. L. Bull. 10 (October, 1966); Packer, "The Courts, the Police, and the Rest of Us," 57 J. Crim. L., C. & P.S. 238 (September, 1966).

[29] The President's Task Force on the Police, *supra*, p. 201.

iii) Tort Liability of Individual Law Officers.

Although damages are, at present, theoretically recoverable against individual police officers under §1983, the remedy is of dubious value due to the frequent uncollectability of such judgments.[30] The predictable result of suing judgment-proof defendants is to discourage private practitioners from taking such cases, and thereby, as a practical matter, foreclosing the claim before it ever gets into court.[31]

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[30] The penuriousness of policemen has attracted judicial notice.

> There can be little doubt that actions for money damages would not suffice to repair the injury suffered by the victims of the police searches . . . [enjoined in this §1983 action] . . . Neither the personal assets of the policemen nor the nominal bonds they furnish afford genuine hope for redress. *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966); *Mapp v. Ohio*, 367 U.S. 643, 670 (1961); *see*, Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493 (1955); Hall, "The Law of Arrest in Relation to Contemporary Social Problems," 3 Univ. of Chicago L. Rev. 345, 346-353 (1936). Another possible problem is exemplified by the instant case, where the potentially transitory individual officer cannot even be found for service.

[31] The United States Commission on Civil Rights recognized this problem as follows:

> The Commission . . . recommends that Congress consider amending §1983 to provide that in all actions brought under this Section – actions for injunctions, as well as for damages – the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs.
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> *United States Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South*, 179-180 (1965).

3. Municipal Liability Under Section 1983 Offers An Effective and Equitable Means of Compensating Victims of Police Misconduct.

Most of the scholars and other commentators who have addressed themselves to the question have concluded that municipal liability in damages constitutes a powerful incentive to the deterrence of police misconduct.[32] The effectiveness of the financial deterrent is essential to motivate police administrative and supervisory personnel to control the conduct of lower echelon officers. The President's Commission found that the capacity to control police conduct is considerable...

> The police administrator currently achieves a high degree of conformity on the part of officers to standards governing such matters as the form of dress, the method of completing reports, and the procedures for processing of citizen complaints. Sleeping on duty, leaving one's place of assignment without authorization, or failing to meet one's financial obligations are all situations against which supervisory personnel currently take effective action.[33]

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[32] Chafee, "Safeguarding Fundamental Human Rights: The Tasks of States and Nations," 27 Geo. Wash. L. Rev. 519 (1959); Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493, 514 (1955); Smith, "Municipal Tort Liability," 48 Mich. L. Rev. 41, 50-51 (1949); Note, "Philadelphia Police Practice and the Law of Arrest," 100 Univ. Pa. L. Rev. 1182 (1952); Note, "Grievance Response Mechanisms for Police Misconduct," 55 Va. L. Rev. 909 (1969).

[33] The President's Task Force on the Police, *supra*, p. 29.

The success of internal controls as applied to such matters appears to depend upon two major factors: (1) the attitude and commitment of the head of the agency to the policies being enforced, and (2) the degree to which individual officers, and especially supervisory officers, have a desire to conform.

The average police administrator, for example, has no ambivalence over accepting responsibility for the physical appearance of his men.

> He does not wait to act until complaints are received from a third party. He undertakes, instead, by a variety of administrative techniques, to produce a desire in his subordinates to conform. This desire may reflect in agreement by the subordinates with the policy. Or it may reflect respect for their superior, a lack of interest one way or the other, or a fear of punishment or reprisal. Whatever the reason, the officer in a sort of 'state of command' does what he is told rather than follow a course of his own choosing . . .
>
> Some of the problems of achieving control over the conduct of individual police officers would be simplified if there were a commitment by the police administrator to a systematic policy formulation process. This would require specific attention to present unarticulated policies which are clearly illegal and as a consequence would create administrative pressure to reject them or develop alternatives rather than assume the indefensible position of formally adopting illegal practices

> as official departmental policy. *Task Force on the Police*, p. 29.

The root of the problem of police misconduct lies not so much in the aberrant behavior or personality of the patrolman on the street, but rather in the attitude and policies of the officials who run the department. Municipal exposure to liability cannot for long be a matter of indifference to top level police administrators, and their concern can readily be translated into modification of the patrolman's practices.

Justice Traynor said of the immunity doctrine in *Muskopf v. Corning Hospital Dist.*, 359 P. 2d at 460:

> "None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact it does not exist. It has become riddled with exceptions, both legislative . . . and judicial. . . . and the exceptions operate so illogically as to cause serious inequality. Some who are injured by governmental agencies can recover, others cannot . . .

While the instant case comes within clearly recognized exceptions thereto, it is time to finally lay the doctrine to rest on appropriate constitutional grounds, especially in cases involving police misconduct. This is the only fair way to achieve the goal of uniformity so vigorously pressed by petitioner.

II. THE RATIONALE OF *MONROE* IS INAPPLICABLE TO MUNICIPALITIES WHICH ARE NOT IMMUNE UNDER LOCAL LAW.

Respondent has urged, at pp. 4-11, *supra*, that the *Monroe* holding excluding cities from suits under §1983 is in need of re-examination, and that relevant considerations of legislative history, public policy and constitutional requirements should lead to a different result. Should the Court decline to re-examine *Monroe* at this time, however, the decision of the circuit court should nevertheless be affirmed, since *Monroe* is clearly distinguishable.

Whatever force the Sherman Amendment debate may have with regard to not imposing additional liability on municipalities under Section 1983 is lost where the conduct complained of would subject municipalities to liability under state law. Thus, there is no inconsistency between upholding Chicago's immunity, as this Court did in *Monroe*, and recognizing the liability of the District of Columbia, as the Circuit Court did in this case. Under Illinois law, Chicago was immune for the intentional torts of its employees (Illinois Rev. Stat. ch. 24 §§1-15 (1959)). The District of Columbia, on the other hand, is clearly liable for such torts apart from Section 1983.[34]

The above distinction was recognized by opponents to the Sherman Amendment. Representative Poland spoke directly to this issue:

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[34] *See*, pp. 45-6, *infra*.

> I presume, too, that had a state imposed a duty upon such municipality, and provided they should be liable for any damages caused by failure to perform such duty, that an action would be allowed to be maintained against them in the courts of the United States . . . . But the enforcing of a liability, existing by their own contract, or by state law is a very widely different thing from devolving a new duty or liability upon them by the national government, which has no power either to create or destroy them and no power or control over them whatever. *Cong. Globe* at 794; see, also, *Cong. Globe* at 795 (remarks of Rep. Burchard).

In the same vein, Representative Burchard recognized that:

> . . . so far as the cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by state laws, the United States could enforce its performance . . . [by an award of damages]. *Cong. Globe* at 795.

This legislative history supports the conclusion of the court below that

> the intent of Congress was not to create municipal immunity, but to defer to the immunity that existed under local common law. Where local law has abolished or narrowed the scope of municipal immunity, the scope of immunity under §1983 should follow the local rule (C.A. p. 20a).

The same conclusion has been reached by the various treatise-writers who have addressed themselves to the matter,[35] and as has been shown, it is supported by highly compelling considerations of public policy.[36]

Further support may be found in an analysis of the underlying purpose of the Civil Rights Act itself as discerned by Mr. Justice Douglas in *Monroe:*

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
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> * * *

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[35] *Kates and Kouba, supra*, n. 2 pp. 157-161; 55 Minn. L. Rev. 1201 at 134-136; A. Van Alstyne, *California Government Tort Liability* §7.8 (1964): "*Monroe* seems to exclude public entities from the purview of the Federal Civil Rights Act for the reason that (and thus perhaps, only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of §1983 to public employees no longer are persuasive."; Comment, "Suing Public Entities Under the Federal Civil Rights Act: *Monroe v. Pape Reconsidered*," 43 U. Col. L.R. 105 (1971).

[36] See, pp. 18-35, *supra*.

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. 365 U.S. 167, 180, 183 (1961).

In light of these observations it would be anomalous indeed to conclude that Congress intended to confront complainants with the dilemma of having to choose between a preferable federal forum[37] and a more effective state remedy. That Congress had no such intent is clearly evidenced by 42 U.S.C. §1988.

A. The Local Rule of Municipal Liability is Incorporated into Section 1983 by Section 1988.

As the Court of Appeals duly noted, (C.A. at 21a) the propriety of imposing liability upon municipal corporations which have abolished or modified municipal immunity

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[37] The independence which arises from the lifetime tenure of federal judges and which was obviously focal in the passage of the 1871 Civil Rights legislation is a benefit unknown to many, if not most state court judges. In the District of Columbia, Superior Court judges are appointed for 15-year terms and are removable by the Commission on Judicial Disabilities and Tenure, D.C. Code, §§11-1502, 26.

Petitioner suggests that if the Court of Appeals ruling in this case is permitted to stand, complainants will be induced to seek redress in District Court. Apparently petitioner is suggesting the spurious notion that encouraging litigants to sue in federal court is inconsistent with §1983.

under local law is strongly implied, if not directly mandated by §1988.[38]

In §1988, Congress provided, in vindicating federally protected civil rights, that where federal laws are "suitable to carry the same into effect" but are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law" then "the common law, as modified and changed by the constitution and statutes of the state" in which the federal court is sitting "so far as the same is not inconsistent with the Constitution and laws of the United States" are to "be extended to and govern . . . the trial and disposition" of the case.[39]

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[38] While it is true that the complaint does not specifically rely upon §1988, this does not bar consideration of that statute in determining respondent's rights under §1983. *Brazier v. Cherry*, 293 F.2d 401 (objection to consideration of §1988 under similar circumstances by dissenting judge impliedly rejected by majority); cf., *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

[39] The full text of 42 U.S.C. §1988 is as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protections of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having

(Cont'd.)

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969), Justice Douglas' opinion for the Court recognized the propriety of resorting to a state rule on damages to implement the rights conferred by §1982, citing *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961).

Brazier was a claim under §§1981, 1983 and 1985(3) for damages for police brutality resulting in the death of the plaintiff's husband. Although no provision of the Civil Rights Act expressly provides for survival of an action for personal injury, the court looked to state law and "borrowed" Georgia's wrongful death statute in order to provide a "suitable remedy" for the violation of §1983. The language of the court is equally applicable to the present case, wherein respondent seeks to "borrow" the local law of municipal liability for the actions of a police officer.

> Indeed, §1988 uses sweeping language. It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes. If the federal law is 'suitable to carry the [policy] into effect' resort to local law is not required. On our analysis federal law is not suitable, *i.e.*, sufficient, since it leaves

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Ptn. 39 (Cont'd.)
jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty (R.S. §722).

a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal statutory framework is, in the words of the statute, 'deficient in the provisions necessary to furnish suitable remedies and punish offenses against' that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies.

The term 'suitable remedies' had a deeper meaning. Used, as it was in parallel with the phrase 'and punish offenses against law,' it comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes.

. . . .

From a federal standpoint the only limitation upon the use of such adoptive state legislation, rule or decision is that it is suitable to carry the law into effect because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. *Thus §1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is*

> *automatically available, not because it is procedure rather than substance, but because Congress says so.*

Ibid., 293 F.2d at 408-9 (emphasis added).

The *Brazier* test for the applicability of Section 1988, cited with approval in *Sullivan*, compels relief against the District of Columbia under Section 1983. If it is proper for a federal court to incorporate the state rule on damages and survival of actions to shape the federal remedy under the federal statute, it is no less appropriate to adopt a local law on municipal liability for the same purpose.

The message from the legislative history and judicial decisions is clear; relief under the federal Civil Rights Act is to be no less effective than relief under state law. Great violence is done that notion if respondent could sue the city in the state courts under the jurisdiction's local law, but is limited in the federal courts to pursuing the usually judgment-proof police officer under the federal statute.[40]

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[40] Of course, under the doctrine of pendent jurisdiction the state claim against the city could be heard in the federal court together with the §1983 claim against the police officer. Both claims are derived from "a common nucleus of operative fact" and the claims are such that the plaintiff would "ordinarily be expected to try them all in one judicial proceeding" *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The doctrine of pendent jurisdiction was used to embrace "extra" non-federal parties in *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3rd Cir. 1966) and *Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968); *cf.*, *Putnum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. den.*, 397 U.S. 990 (1970).

Contrary to petitioner's contention on this point, there is nothing inconsistent with the rationale of *Monroe* in adopting the local law on municipal liability. In *Monroe*, the court had no occasion to consider the question of liability under §1988 of a municipal corporation which at pp. 4-8, *supra*, the entire thrust of the Sherman did possess such immunity. Indeed, as has been discussed at pp. , *supra*, the entire thrust of the Sherman Amendment debate was simply to avoid the imposition of a duty, and consequent liability for violating that duty, upon a governmental entity which would otherwise have no such liability – a consideration totally irrelevant to the present situation.[41] Accordingly, we read *Monroe* as holding no more than that there can be no municipal liability inconsistent with local law, and therefore not dispositive of the question in those states permitting actions against municipalities.[42]

The District of Columbia objects that incorporating the local law of a particular state on the question of municipal immunity runs counter to the general notion of uniformity of federal law. What appellant fails to recognize,

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[41] *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968), cited by petitioner, is similarly inapposite, since §1988 was not cited to the court, and no consideration was given to its potential remedial role.

[42] The propriety of incorporating local law on municipal liability under §1988 to afford a remedy under §1983 was recognized in *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D. N.Y. 1970). A similar approach was used to find liability under §1981 in *U.S. ex rel Washington v. Chester County Police Department*, 294 F. Supp. 1157 (E.D. Pa. 1969); *cf.*, "Developing Governmental Liability Under 42 U.S.C. §1983," 55 Minn. L. Rev. 1201, 1214-1222.

however, is that lack of uniformity is necessarily implied in §1988. By its very terms, §1988 " . . . provides for the use of state law as a supplement to the remedial powers of federal district courts." *Baker v. F. & F. Investment*, 420 F.2d 1191, 96 (7th Cir. 1970). Section 1988 reflects a congressional willingness to sacrifice uniformity, if necessary, for the goal of a fully effective federal remedy.

B. The Common Law of the District of Columbia Permits Suits Against the Municipality Arising From the Tortious Misconduct of Its Police Officers.

The gradual but relentless demise of the doctrine of sovereign immunity in the District of Columbia over the past decade has been traced by the U.S. Court of Appeals for the District of Columbia, sitting *en banc* in *Spencer v. General Hospital of the District of Columbia*, 138 U.S. App. D.C. 48, 425 F.2d 479 (1969). In *Elgin v. District of Columbia*, 119 U.S. App. D.C., 116, 337 F.2d 152 (1964) the once-hallowed "governmental/proprietary" distinction was finally laid to rest, and the far more flexible "ministerial-discretionary" dichotomy was erected in its place.[43] The movement toward expanding municipal liability signaled by *Elgin* was noted and approved in the opinion of the court and the concurring

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[43] One noted commentator has described *Elgin* as representing " . . . as complete an abolition of the doctrine of sovereign immunity from tort liability as any judicial opinion that has been written by any of the state courts that have abolished that doctrine." Davis, 3 Administrative Law T., §25.01 at p. 107 (1965 Pocket Part).

opinions in *Spencer*, wherein the District was held answerable for the malpractice of employees at the District of Columbia General Hospital. In a resounding reaffirmation of the liberalized rules set forth in *Elgin*, the court placed itself squarely in the camp of those jurisdictions which have judicially abrogated sovereign immunity,[44] one member noting that "few doctrines in the law have sustained such voluminous, searching and nearly unanimous attack as the principle that governments should not respond in damages for their torts." *Spencer*, 425 F.2d at 485 (concurring opinion of Judge Wright). The decision of the court below, reaffirming *Spencer* and holding that the District may be liable directly, as well as vicariously, for the acts of its policemen, is thus merely the most recent in an unbroken chain of decisions progressively abandoning the widely discredited immunity doctrine.[45] It is thus clear that implementation of §1988 renders the District liable for at least the ministerial acts of its employees.

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[44] See n. 11, *supra*.

[45] The specific application of the *Elgin/Spencer* formula to a police brutality situation had been foreshadowed in *Thomas v. Johnson*, 295 F. Supp. 1025 (D. D.C., 1968) holding that the District of Columbia is under a duty to properly train, control and supervise its police officers. The *Carter* holding has recently been followed by the District of Columbia Court of Appeals in *Graves v. District of Columbia* (D.C. App. No. 5086, February 17, 1972) 287 A.2d 524 (petition for rehearing *en banc* granted April 3, 1972).

III. THE ARGUMENTS RAISED IN OPPOSITION TO THE SHERMAN AMENDMENT ARE INAPPLICABLE TO THE DISTRICT OF COLUMBIA, WHICH IS AN INSTRUMENTALITY OF THE FEDERAL GOVERNMENT.

A basic criticism of the Sherman Amendment was that it would in effect have violated the then generally held constitutional premise that Congress could not impose a tax upon the states. *Cong. Globe*, 756-757, 759, 762, 764 (remarks of Sen. Conkling, Trumbull, Stevenson and Davis). This criticism, to the extent that it reflected attempted constitutional analysis rather than rhetorical flourish, proceeded on the metaphysical reasoning that Congress would be "imposing" taxes upon municipalities by forcing the muncipalities to levy taxes to meet the cost of liabilities incurred under the Sherman Amendment.

Such arguments, rooted in late 19th century notions of highly restricted federal powers, have no applicability where, as here, the District of Columbia is involved. Congress possesses broad legislative authority over the District of Columbia (Constitution, Article I, Section 8, Clause 17), extending not merely to national affairs, but to all matters of funding and other legislation. *Berman v. Parker*, 348 U.S. 26 (1954); *District of Columbia v. John R. Thomason Co.*, 346 U.S. 100 (1953); *Neild v. District of Columbia*, 71 App. D.C., 306, 110 F.2d 246 (1940). Indeed, the specific power of Congress to impose taxes upon the District of Columbia was noted in the debate over the Sherman Amendment. *Cong. Globe* at 799 (remarks of Rep. Smith). Thus, whatever inhibitions the rejection of the Sherman Amendment may reflect as to the power Congress felt it has in imposing duties on state instrumentalities, there could not have been any doubt as to the

power of Congress to impose civil liability on the District of Columbia under §1983.

The role of the "Dictionary Act" of February 25, 1871 in defining the word "person" was noted by this Court in *Monroe*, 365 U.S. at 191. Significantly, only four days earlier, the Congress had created

> a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, *sue and be sued*, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.
> Act of Feb. 21, 1871, 16 Stat. 419, emphasis added).

It is reasonable to infer that on Feb. 25, 1871, Congress was still mindful of what it had done on Feb. 21, and understood and intended that the District was "a body corporate" within the meaning of the word "person." The proximity in time between the two acts is sufficiently compelling to warrant the conclusion that if Congress had intended to exclude the newly-created District from the ranks of "bodies politic and corporate," it would have done so expressly.

The authority to "be sued" constitutes a waiver of whatever immunity to suit might otherwise be thought to exist. *Federal Housing Administration v. Burr*, 309 U.S. 242, 1940. One may well conclude, therefore, that in enacting §1983 Congress intended to include as a "person" subject

to liability the unique municipal corporation which it had created and endowed with "suability" less than two months earlier.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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No. 71-564

Nov. 10, 1972 - Memorandum for petitioner and memorandum for respondent filed. NOT PRINTED.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DISTRICT OF COLUMBIA *v.* CARTER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-564. Argued November 6, 1972—Decided January 10, 1973

The District of Columbia is not a "State or Territory" within the meaning of 42 U. S. C. § 1983, and the Court of Appeals therefore erred insofar as that court sustained respondent's claims for deprivation of civil rights pursuant to that statute. Pp. 2–15.

144 U. S. App. D. C. 388, 447 F. 2d 358, reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 71-564

District of Columbia, Petitioner, *v.* Melvin Carter. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 10, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On February 12, 1969, respondent filed this civil action in the United States District Court for the District of Columbia alleging that in 1968 police officer John R. Carlson of the Metropolitan Police Department of the District of Columbia arrested him without probable cause and, while he was being held by two other officers, beat him with brass knuckles. The complaint alleged further that Carlson's precinct captain, the chief of police, and the District of Columbia each had negligently failed to train, instruct, supervise, and control Carlson with regard to the circumstances in which an arrest may be made and the extent to which various degrees of force may be used to effect an arrest. Respondent sought damages against each defendant upon several theories, including a common law theory of tort liability and an action for deprivation of civil rights pursuant to 42 U. S. C. § 1983, which provides: [1]

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

[1] Ku Klux Klan Act of 1871, Act of April 20, 1871, c. 22, § 1, 17 Stat. 13, Rev. Stat. § 1979, 42 U. S. C. § 1983 (1970).

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The District Court dismissed the complaint against all defendants without opinion.[1] On appeal, the United States Court of Appeals for the District of Columbia reversed, holding that the allegations of the complaint were sufficient to state causes of action under both the common law and federal statutory theories of liability. *Carter* v. *Carlson*, 447 F. 2d 358 (1971). In sustaining respondent's claims under § 1983, the court held that "[a]cts under color of the law of the District of Columbia are under color of the law of a 'State or Territory' for the purpose of § 1983." *Id.*, at 361, n. 3. We granted certiorari. 404 U. S. 1014. For the reasons stated below, we hold that the District of Columbia is not a "State or Territory" within the meaning of § 1983. We therefore reverse the judgment of the Court of Appeals insofar as that judgment sustained respondent's claims under § 1983.[2]

I

Whether the District of Columbia constitutes a "State" or "State or Territory" within the meaning of any par-

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[1] Officer Carlson was never found for service of process. The precinct captain and police chief moved to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. Their supporting memorandum argued that no tort on their part has been committed, and that in any event they were protected by the doctrine of official immunity. The District of Columbia moved to dismiss the complaint for failure to state a claim, and also on the ground of sovereign immunity.

[2] We therefore have no occasion to determine whether, as urged by petitioner, the District is not a "person" for the purpose of 42

ticular statutory or constitutional provision depends upon the character and aim of the specific provision involved.[4] Indeed, such "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *Puerto Rico* v. *The Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 258 (1937); see *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 86, 87–88 (1934); *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433 (1932).

The Court of Appeals' conclusion that the District of Columbia is a "State or Territory" for the purpose of § 1983 was premised almost exclusively upon this Court's earlier determination that "the District of Columbia is included within the phrase 'every State and Territory'" as employed in 42 U. S. C. § 1982. *Hurd* v. *Hodge*, 334 U. S. 24, 31 (1948).[5] At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same

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U. S. C. § 1983. In addition, we intimate no view on the merits of respondent's claims insofar as they are predicated on other theories of liability.

[4] Compare *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Talbott* v. *Silver Bow County*, 139 U. S. 438 (1891); *DeGeofroy* v. *Riggs*, 133 U. S. 258 (1890); *Callan* v. *Wilson*, 127 U. S. 540 (1888), with *Bolling* v. *Sharpe*, 347 U. S. 497 (1954); *Wight* v. *Davidson*, 181 U. S. 371 (1901); *Hepburn* v. *Ellzey*, 6 U. S. [2 Cranch] 445 (1805).

[5] The Court of Appeals also cited *Sewell* v. *Pegelow*, 291 F. 2d 196 (CA4 1961), which, relying upon *Hurd*, also held that the District of Columbia is a "State or Territory" within the meaning of § 1983. That decision is likewise disapproved.

in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law. . . ." *Atlantic Cleaners & Dyers* v. *United States*, *supra*, 286 U. S., at 433. And the logic underlying the Court of Appeals' assumption breaks down completely where, as here, "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed . . . with different intent." *Ibid.*

Section 1982, which first entered our jurisprudence as § 1 of the Civil Rights Act of 1866, Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This provision was enacted as a means to enforce the Thirteenth Amendment's proclamation that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437–438 (1968). As its text reveals, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U. S. 3, 20 (1883); see *Griffin* v. *Breckenridge*, 403 U. S. 88, 105 (1971); *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U. S., at 437–440; *Clyatt* v. *United States*, 197 U. S. 207, 216, 218 (1905). Thus, it cannot be doubted that the power vested in Congress to enforce this Amendment includes the power to enact laws of nationwide application.

Moreover, like the Amendment upon which it is based, § 1982 is not a "mere prohibition of State laws establishing or upholding" racial discrimination in the sale or rental of property but, rather, an "absolute" bar to *all* such discrimination, private as well as public, federal as well as state. Cf. *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U. S., at 413, 437. With this in mind, it would be anomalous indeed if Congress chose to carve out the District of Columbia as the sole exception to an act of otherwise universal application. And this is all the more true where, as here, the legislative purposes underlying § 1982 support its applicability in the District. The dangers of private discrimination, for example, which provided a focal point of Congress' concern in enacting the legislation,[6] were, and are, as present in the District of Columbia as in the States, and the same considerations which led Congress to extend the prohibitions of § 1982 to the Federal Government apply with equal force to the District, which is a mere instrumentality of that Government. Thus, in the absence of some express indication of legislative intent to the contrary,[7] there was ample justification for the holding in *Hurd* that § 1982 was intended to outlaw racial discrimination in the sale or rental of property in the District of Columbia as well as elsewhere in the United States.

The situation is wholly different, however, with respect to § 1983. Unlike § 1982, which derives from the Civil Rights Act of 1866, § 1983 has its roots in § 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c. 22, § 1, 17 Stat. 13. This distinction has great significance,

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[6] See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 422–436 (1968).

[7] Although the legislative debate over the 1866 Act did not focus specifically on the District, there are numerous indications that the Act was designed to "extend to all parts of the country." Cong. Globe, 39th Cong., 1st Sess., 323 (Senator Trumbull); see, *e. g.*, *id.*, at 426, 474.

for unlike the 1866 Act, which was passed as a means to enforce the Thirteenth Amendment, the primary purpose of the 1871 Act was "to enforce the Provisions of the Fourteenth Amendment." 17 Stat. 13; see, *e. g.*, *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961); see also Cong. Globe, 42 Cong., 1st Sess., App. 68, 80, 83–85. And it has long been recognized that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources. See the *Civil Rights Cases*, 109 U. S. 3. Compare *United States* v. *Williams*, [341 U. S. 70], with *Screws* v. *United States*, 325 U. S. 91." *Monroe* v. *Pape*, *supra*, 365 U. S., at 205–206 (separate opinion of Frankfurter, J.).

In contrast to the reach of the Thirteenth Amendment, the Fourteenth Amendment has only limited applicability; the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority. See, *e. g.*, *Civil Rights Cases*, *supra*; *United States* v. *Harris*, 106 U. S. 629 (1883); *United States* v. *Cruikshank*, 92 U. S. 542 (1876). The Fourteenth Amendment itself "erects no shield against merely private conduct, however discriminatory or wrongful."[9] *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see also *United States* v. *Price*, 383 U. S. 787 (1966); *Evans* v. *Newton*, 382 U. S. 296 (1966); *Hodges* v. *United States*, 203 U. S. 1 (1906). Similarly, actions of the Federal Government and its officers are beyond the purview of the Amendment. And since the District of Columbia is not a "State" within the meaning of the Fourteenth Amendment, see *Bolling* v. *Sharpe*, 347 U. S.

[9] This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment. See *United States* v. *Guest*, 383 U. S. 745, 762 (1966) (Clark, J., concurring); *id.*, at 782–784 (separate opinion of BRENNAN, J.). Cf. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966).

497, 499 (1954); *Shelley* v. *Kraemer*, *supra*, 334 U. S., at 8; *Wight v. Davidson*, 181 U. S. 371, 384 (1901), neither the District nor its officers are subject to its restrictions.[9]

Like the Amendment upon which it based, § 1983 is of only limited scope. The statute deals only with those deprivations of rights which are accomplished under the color of the law of "any State or Territory." [10] It does not reach purely private conduct and, with the exception of the Territories,[11] actions of the Federal Government and its officers are at least facially exempt from its proscriptions. Thus, unlike the situation presented in *Hurd*, the instant case does not involve a constitutional provision and related statute of universal applicability. This being so, the considerations which led to an expansive reading of § 1982 so as to include the District of Columbia simply do not apply with respect to § 1983. We must therefore examine the legislative history of § 1983 to determine whether the purposes for

[9] Thus, unlike the situation with respect to § 1982 and the Thirteenth Amendment, inclusion of the District of Columbia in § 1983 cannot be subsumed under Congress' power to enforce the Fourteenth Amendment but, rather, would necessitate a wholly separate exercise of Congress' power to legislate for the District under Art. I, § 8, cl. 17.

[10] It should be observed that, unlike § 1982, which uses the phrase "every State and Territory" as a mere geographical description, the expression "any State or Territory" in § 1983 constitutes a substantive limitation upon the types of conduct which are prohibited.

[11] As initially enacted, § 1 of the 1871 Act applied only to action under color of the law of any "State." 17 Stat. 13. The phrase "or Territory" was added, without explanation, in the 1874 codification and revision of the United States Statutes at Large. Rev. Stat. § 1979 (1874). Since the Territories are not "States" within the meaning of the Fourteenth Amendment, see *South Puerto Rico Sugar Co.* v. *Buscaglia*, 154 F. 2d 96, 101 (CA1 1946); *Anderson* v. *Scholes*, 83 F. Supp. 681, 687 (Alaska 1949), this addition presumably was an exercise of Congress' power to regulate the Territories under Art. IV, § 3, cl. 2.

which the Act was adopted support a similarly broad construction.

II

Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted.[12] After the Civil War ended in 1865, race relations in the South became increasingly turbulent. The Ku Klux Klan was organized by southern whites in 1866, and a wave of murders and assaults was launched against both blacks and Union sympathizers.[13] Thus, at the opening of the 42d Congress, considerable apprehension was expressed by Republicans about the insecurity of life and property in the South,[14] and on March 23, 1871, President Grant sent a message to Congress requesting additional federal legislation to curb this rising tide of violence. Such legislation was deemed essential in light of the inability of the state governments to control the situation.[15] Five days later, Mr. Shellabarger of Ohio introduced the bill which eventually was to become the Ku Klux Klan Act of 1871.[16]

Although there are threads of many thoughts running through the debates on the 1871 Act, it seems clear that § 1 of the Act, with which we are here concerned, was

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[12] See generally Stampp, The Era of Reconstruction, 1865–1877 (1965); Nevins, The Emergence of Modern America, 1865–1878 (1927).

[13] See Nevins, *supra*, n. 12, at 351. For an appreciation of the nature and character of the Ku Klux Klan as it appeared to Congress in 1871, see S. Rep. No. 1, 42d Cong., 1st Sess. (1871), and the voluminous report of the Joint Select Committee to inquire into the Condition of Affairs in the late Insurrectionary States, published as S. Rep. No. 41, pts. 1–13; H. R. Rep. No. 22, pts. 1–13, 42d Cong., 2d Sess. (1872).

[14] See Cong. Globe, 42d Cong., 1st Sess., 116–117.

[15] See *id.*, at App. 226.

[16] See Cong. Globe, 42d Cong., 1st Sess., 317.

designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others.[17] Thus, while the Klan itself provided the principal catalyst for the legislation, the remedy created in § 1 "was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, *supra*, 365 U. S., at 175–176 (emphasis in original). Senator Pratt of Indiana summarized this concern when he said: [18]

> ". . . of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux Klan organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then justice closes the door of her temples."

Similarly, Mr. Hoar of Massachusetts stated: [19]

> "Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before

[17] See, *e. g.*, *id.*, at 154–159 (Senator Sherman), 322 (Mr. Stoughton), 374 (Mr. Lowe), 428 (Mr. Beatty), 516–519 (Mr. Shellabarger), 653 (Senator (Osborn); *id.*, at App. 72 (Mr. Blair), 78 (Mr. Perry), 100–110 (Senator Pool).

[18] Cong. Globe, 42d Cong., 1st Sess., 505.

[19] *Id.*, at 334.

a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection."

To the Reconstruction Congress, the need for some form of federal intervention was clear. It was equally clear, however, that Congress had neither the means nor the authority to exert any direct control, on a day-to-day basis, over the actions of state officials. The solution chosen was to involve the federal judiciary. At the time this Act was adopted, it must be remembered, there existed no general federal question jurisdiction in the lower federal courts.[20] Rather, "Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws."[21] *Zwickler* v. *Koota*, 389 U. S. 241, 245 (1967). With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal

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[20] Original "arising under" jurisdiction, pursuant to Art. III, § 2, cl. 1, was vested in the federal courts by § 11 of the Act of February 13, 1801, c. 4, 2 Stat. 92, but was repealed only a year later by § 1 of the Act of March 8, 1802, c. 8, § 1, 2 Stat. 132. It was not until 1875 that Congress granted the Federal District Courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States. . . ." Act of March 3, 1875, c. 137, § 1, 18 Stat. 470. The jurisdictional amount has since been raised from $500 to $2,000 by the Act of March 3, 1887, 24 Stat. 552; to $3,000 by the Act of March 3, 1911, 36 Stat. 1091; and to $10,000 by the Act of July 25, 1958, 72 Stat. 415. The provision is now codified as 28 U. S. C. § 1331 (1970).

[21] The only exception was the 25th section of the Judiciary Act of 1789, 1 Stat. 85, providing for Supreme Court review whenever a claim of federal right was denied by a state court.

control over the unconstitutional actions of state officials.[22] Mr. Coburn explained:[23]

> "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so."

Thus, in the final analysis, § 1 of the 1871 Act may be viewed as an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S., at 180.

There was no need, however, to create federal court jurisdiction for the District of Columbia. Even prior to 1871, the courts of the District possessed general jurisdiction over both federal and local matters. Act of March 3, 1863, c. 91, 12 Stat. 762. Thus, the jurisdictional aspects of § 1 of the 1871 Act were entirely superfluous with respect to the District. Moreover, while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary

[22] Thus, as originally enacted, § 1 of the 1871 Act provided that the proceedings authorized by the Act are "to be prosecuted in the several district or circuit courts of the United States. . . ." 17 Stat. 13. This aspect of § 1 is now codified at 28 U. S. C. § 1343 (3) (1970).

[23] Cong. Globe, 42d Cong., 1st Sess., 460.

power over the District of Columbia and its officers.[24] Indeed, "[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs." *Berman* v. *Parker*, 348 U. S. 26, 31 (1954); see *District of Columbia* v. *Thompson*, 346 U. S. 100, 108 (1953); *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 602 (1949); *Kendall* v. *United States*, 37 U. S. [12 Pet.] 524, 619 (1838). And since the District is itself the seat of the National Government, Congress was in a position to observe and, to a large extent, supervise the activities of local officials.[25] Thus, the rationale underlying Con-

[24] In pertinent part, Art. I, § 8, cl. 17, of the Constitution provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of Government of the United States. . . ."

[25] The District of Columbia police system, for example, was operated under the direction of a board of five commissioners appointed by the President with the advice and consent of the Senate. The statutes creating the metropolitan police system established a network of regulations and reporting requirements which enabled the Federal Government to keep a watchful eye over police conduct. See Act of August 6, 1891, c. 62, 12 Stat. 320; Act of July 16, 1862, c. 181, 12 Stat. 578.

Respondent seeks to make much of the fact that, in 1871, Congress established a "territorial" form of government for the District of Columbia, with a governor and legislative assembly, to which the general administration of the affairs of the District was committed. Act of February 21, 1871, c. 62, 16 Stat. 419. In light of this development, respondent argues, Congress must have intended the word "Territory" in § 1 of the Ku Klux Klan Act to include the District of Columbia. What respondent apparently overlooks, however, is that on June 20, 1874, the very day that the phrase "or Territory" was formally enacted into the revised version of § 1 of the Ku Klux Klan Act, see n. 11, *supra*, Congress also abolished the "territorial" form of government in the District and, in its stead, authorised the President, with the advice and consent of the Senate, to appoint a commission of three members to exercise the power previously vested in the governor and assembly. Act of June 20, 1874, c. 337, 18 Stat. pt. 3, 116.

gress' decision not to enact legislation similar to § 1983 with respect to federal officials—the assumption that the Federal Government could keep its own officers under control—is equally applicable to the situation then existing in the District of Columbia.

It is true, of course, that Congress also possessed plenary power over the Territories.[26] For practical reasons, however, effective federal control over the activities of territorial officials was virtually impossible. Indeed, "the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States. . . ." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 546 (1962); see also Pomeroy, The Territories and the United States (1861–1890) 92 (1947); H. R. Rep. No. 440, 48th Cong., 1st Sess. (1884); S. Rep. No. 1249, 49th Cong., 1st Sess. (1886). Thus, although the Constitution vested control over the Territories in the Congress, its practical control was both "confused and ineffective," [27] making the problem of enforcement of civil rights in the Territories more similar to the problem as it existed in the States than in the District of Columbia.[28]

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[26] Article IV, § 3, cl. 2, provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

[27] Pomeroy, The Territories and the United States (1861–1890) 4 (1947).

[28] Moreover, unlike the courts of general jurisdiction in the District of Columbia, which were created under the authority vested in Congress by Art. III, § 1, see *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), the federal courts in the Territories were established under Art. IV, § 3, cl. 2, see *Glidden* v. *Zdanok*, 370 U. S.

Moreover, the effort to analogize the District of Columbia to the Territories in this context faces strong theoretical obstacles. The territorial state has aptly been described as "one of pupilage at best." *Nelson* v. *United States*, 30 Fed. 112, 115 (Ore. 1887). From the moment of their creation, the Territories were destined for admission as States into the Union, and "as a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of which was necessarily limited to the period of pupilage." *O'Donoghue* v. *United States*, 289 U. S. 516, 537 (1933); see *McAllister* v. *United States*, 141 U. S. 174, 188 (1891). Thus, in light of the transitory nature of the territorial condition, Congress could reasonably treat the Territories as inchoate States, quite similar in many respects to the States themselves, to whose status they must inevitably ascend.

The District of Columbia, on the other hand, "is an exceptional community . . . established under the Constitution as the seat of the National Government." *District of Columbia* v. *Murphy*, 314 U. S. 441, 452 (1941). As such, it "is as lasting as the States from which it was carved or the union whose permanent capital it became." *O'Donoghue* v. *United States*, *supra*, 289 U. S., at 538. Indeed, it is "the very heart . . . of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within

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530 (1962); *American Insurance Co.* v. *Canter*, 26 U. S. [1 Pet.] 511 (1828). This distinction also has significance for our problem, for unlike judges in the District, territorial judges were appointed for terms of only four years. Rev. Stat. § 1864 (1874). As a result, the territorial judges were peculiarly susceptible to local pressures, since their reappointments were often dependent upon favorable recommendations of the territorial legislatures. See Pomeroy, *supra*, n. 26, at 98–102.

which the immense powers of the general government were destined to be exercised." *Id.*, at 539. Unlike either the States or Territories, the District is truly *sui generis* in our governmental structure.

With this unique status of the District of Columbia in mind, and in the absence of any indication in either the language, purposes or history of § 1983 of a legislative intent to include the District within the scope of its coverage, the conclusion is compelled that the Court of Appeals erred in holding that the District of Columbia constitutes a "State or Territory" within the meaning of § 1983. Just as "[w]e are not at liberty to seek ingenious analytical instruments" to avoid giving a congressional enactment the broad scope its language and origins may require, *United States* v. *Price*, *supra*, 383 U. S., at 801, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it. This is not to say, of course, that a claim, such as a possible claim against officer Carlson, of alleged deprivation of constitutional rights is not litigable in the federal courts of the District. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U. S. 388 (1971); *Bell* v. *Hood*, 327 U. S. 678 (1946). But insofar as the judgment of the Court of Appeals sustaining respondent's claims rested on § 1983, that judgment must be, and is,

Reversed.

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IN THE

Supreme Court of the United States

TERM 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

SUMMARY OF ARGUMENT

On January 10, 1973, this Court reversed the judgment of the court below on the ground that the District of Columbia was not a "State or Territory" within the meaning of 42 U.S.C. §1983. This decision was premised on the following explicit assumptions:

(1) that the Civil Rights Act of 1871, enacted primarily to enforce the Fourteenth Amendment, was aimed solely at

regulating procedures in the states, and was not intended to be applicable to the District of Columbia;

(2) that 42 U.S.C. §1983 is derived solely from the Civil Rights Act of 1871, and is therefore limited in its application to the targets of that statute; and

(3) that although the District of Columbia had a territorial government from 1871-74, that fact does not bring the District within the meaning of the phrase "State or Territory" because the words "or Territory" were not enacted until June 20, 1874, the same day that Congress abolished the "territorial" form of government in the District of Columbia (slip op., n. 25).

Since the issue of the District's inclusion within the phrase "State or Territory" was never raised until oral argument before this Court, appellees had no occasion to research the question prior to argument, nor did the three-day period allowed for filing post-hearing supplementary memoranda furnish adequate time for the research.

Subsequent research, conducted since the Court's opinion, now reveals compelling evidence in the legislative history which points to contrary conclusions on all three of these basic assumptions.

I. THE CIVIL RIGHTS ACT OF 1871 WAS NOT INTENDED TO BE LIMITED TO THE STATES, BUT WAS MEANT TO APPLY THROUGHOUT THE UNITED STATES.

The Civil Rights Act of April 20, 1871, was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and

for Other Purposes"[1] (emphasis added). It is apparent from President Grant's implementing proclamation of May 3, 1871,[2] that the Act was intended to apply not merely to the states, but throughout the country. In the same clear and unequivocal language that had been used by the 39th Congress to describe the intended coverage of the 1866 Civil Rights Act, some five years earlier,[3] President Grant declared that

> This law of Congress *applies to all parts of the United States*, and will be enforced *everywhere*, to the extent of the powers vested in the Executive (emphasis added).

Only after noting this universal applicability of the Act does President Grant proceed to "particularly exhort" those citizens in the more turbulent areas, whose activities led to the enactment, to voluntarily suppress violence in their areas.

The President proceeds to express his

> "earnest wish that peace and cheerful obedience to law may prevail throughout the land, and that all traces of our late unhappy civil strife may be speedily removed. These ends can be easily reached by acquiescence in the results of the conflict, now written

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[1] If, as the Court assumes, the statute were intended merely to enforce the Fourteenth Amendment, there would be no necessity for the last four words of its title.

[2] 17 Stat. 949-50 (see copy attached hereto as "Appendix A").

[3] Slip opinion, p. 5, n. 7.

> in our Constitution, and by the due and proper enforcement of equal, just, and impartial laws *in every part of our country* (emphasis added).[4, 5]

II. 42 U.S.C. §1983 WAS INTENDED TO ENFORCE THE CIVIL RIGHTS ACTS OF 1866 AND 1870, AS WELL AS THE CIVIL RIGHTS ACT OF 1871.

In *Hurd v. Hodge*, 334 U.S. 24, 31 (1948), this Court held that the District of Columbia was included within the phrase "State or Territory" in 42 U.S.C. §1982. In the instant case, the Court has distinguished the *Hurd* determination by linking §1982 with the Civil Rights Act of

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[4] President Grant's sweeping language is wholly consistent with the title of the Act. Just as the writ of the new law was to run to "every part of our country," so was the aim of the Act not merely to enforce the provisions of the Fourteenth Amendment, but also "for other purposes." It may be inferred from the proclamation that one such purpose was to enforce the Thirteenth, as well as the Fourteenth Amendment, since both of these Civil War amendments are presumably included within the reference to "the results of the conflict, now written in our Constitution."

[5] There can, of course, be no question of Congress' power to legislate for the District under Article I, §8 cl. 17. It is significant that Congress' power to tax and legislate for the District was expressly adverted to during the debates on the Act of April 20, 1871 in the context of discussing the power of a legislature to make a local unit respond in damages. Cong. Globe, April 19, 1871, p. 799 (Rep. Smith). Although the question had not been squarely raised, Rep. Smith thought it relevant to point out that Congress already possessed the power over the District which was implicit in the bill then being discussed. *Ibid.*

April 9, 1866, Ch. 31, §1, 14 Stat. 27, which Act was enacted to implement the Thirteenth Amendment, the scope of which is undeniably nationwide (see cases cited at slip op., p. 4). Since, as the following history indicates, what is now §1983 was intended to enforce the 1866 Civil Rights Act as well as those of 1870 and 1871, the inference is inescapable that the District of Columbia must be included within its scope.

The Civil Rights Act of April 9, 1866, c. 31 §1, 14 Stat. 27, provides, in part, that:

> All . . . citizens . . . shall have the same right, in every State or Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of the person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

After the enactment of the Fourteenth Amendment in 1868, the original Civil Rights Act was reenacted in the enforcement act of May 31, 1870, 16 Stat. 144, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State or Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

> subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

On April 20, 1871, the Ku Klux Klan Act[6] was enacted as a companion statute to the Civil Rights Act of 1866.

In 1872, these three statutes were revised and consolidated by the revisory commission[7] as follows:

> Title XXVI *Civil Rights*
>
> Section 1. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

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[6] "Any person who under cover of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any law, statute, ordinance, regulation, custom, or usage of the state to the contrary, notwithstanding, be liable to the party injured, in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted* in the several district or circuit courts of the United States, *with and subject to the same rights of appeal*, review upon error, *and other remedies provided in like cases* in such courts *under the provisions of the Act of the 9th of April, 1866*, entitled "An Act to Protect All Citizens in the United States in Their Civil Rights, and to Furnish the Means of Their Vindication," and the other remedial laws of the United States which are in their nature applicable in such cases" (emphasis added).

[7] The revisory commission of "three persons, learned in the law" was appointed by the Congress "to revise, simplify, arrange and consolidate" all statutes of the United States. Act of June 27, 1866 (39th Cong., 1st Sess., c. 140, 14 Stat. at L., 74). (continued)

and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 2. All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 3. Every person who, under color of any statute, ordinance, regulation, custom, or

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[7] (continued)

The intended function of the Commissioners was described as follows by Rep. Lawrence:

> The commissioners were duly appointed, and executed a part of the work assigned them, when the term expired. Congress, by act of May 4, 1870, revived the original statute, and authorized the appointment of three commissioners to complete the work within three years. (16 Statutes, 96.) The commissioners were duly appointed. They were authorized not merely to copy and arrange in proper order, and classify in heads the actual text of statutes in force, but to 'supply the omissions and amend the imperfections of the original text.' In executing this work they very often translated into their own language the ideas and objects of statutes, so that the new form adopted might be said to be *inspired by Congress in ideas*, but not in words. This mode frequently condensed existing laws, and thus often improved them.

> usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[8]

The Act of March 3, 1873, 17 Stat. 579, authorized the Committee of the Senate and the House of Representatives on the Revision of the Laws to "contract with some suitable person to prepare . . . the revision of the statutes then already reported by the commissioners, or which might by them be thereafter reported before the 4th of May, 1873" in a form which might be acted upon by the Congress at the opening of the session of December, 1873.

Mr. Durant was chosen to undertake this revision, and Durant's Revision was reported to the Committee on Revision (Rep. Poland, Chairman) in December, 1873.

Durant's Revision carried over intact as Sections 1982, 1983 and 1984 the same language that was used by the Commissioners in Sections 1, 2 and 3 of Title XXVI.

On January 21, 1874, Rep. Lawrence took the floor of the House to explain in detail the process by which the sequence and content of these three related sections

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[8] Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Washington, Government Printing Office, 1872, Vol. I, p. 947.

was developed. After quoting at length from the Civil Rights Acts of 1866 and 1870, Rep. Lawrence stated as follows:

> The Commissioners, in Vol. I, p. 947, Title XXVI and Sections L, 2 and 3, and Mr. Durant in his volume of General Laws, p. 432, Title XXIV, Sections 1982, 1983 and 1984, both, under the head of "Civil Rights," translate the sections I have cited from the Acts of 1866 and 1870, so far as they relate to a declaration of existing rights, *and confer a right of civil action for their violation* as follows: [Rep. Lawrence then quotes Sections 1, 2 and 3 from the Commissioners' Draft, which are set forth at pp. 6-8, *supra*].[9]

The sum and substance of this explanation, to which no objection was raised, is that Sections 1 and 2 of the Commissioners' Draft were intended to restate the substance of the Civil Rights Acts of 1870 and 1866, respectively, while Section 3 was intended to "confer a right of civil action for their violation."[10] To accomplish this purpose, the Commissioners had found it necessary to add the words "or Territory" to the third section. Only by this addition could the enforcement section be coextensive with the 1866 and 1870 Acts which it was intended to enforce.[11]

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[9] Cong. Record, Vol. 2, Pt. 1, 43rd Cong., 1st Sess., p. 828.

[10] Of course, Section 3 of the Commissioners' Draft also carried forward the corresponding provision of the Act of April 20, 1871.

[11] Because of the brevity of the 3-day period allowed for filing the post-hearing briefs on this issue, counsel did not find Rep.

(continued)

Sections 1, 2 and 3 of the 1872 Commissioners' Revision have been carried forward intact through Durant's Revision, through the Revised Statutes of 1874 and exist today, verbatim, as §§1981, 1982 and 1983 of Title 42. The following table shows the corresponding section designations:

Commissioners' Revision (draft) of 1872	Durant's Revision (1873)	Rev. Stat. (1874)	U.S. Code Title 42
Title XXVI §1	§1982	§1977	§1981
§2	§1983	§1978	§1982
§3	§1984	§1979	§1983

The implications of this legislative history for the present issue, and in terms of current U.S. Code designations, would appear to be inescapable: What we now know as §1983, in addition to embodying the cause of action created by the Act of April 20, 1871, was intended to confer a civil action for violations of what are now §§1981 and 1982, and the phrase "or Territory" was added in order to make the scope of §1983 co-extensive with the two preceding sections. It necessarily follows that the phrase "State or Territory" was intended by the revisory commission in 1872 to have the same scope in all three sections. This Court's earlier determination in *Hurd* that the District is included within §1982 thus dictates a similar inclusion in §1983.

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11 (continued) Lawrence's explanation, which constitutes a rather critical piece of the legislative history. Accordingly, the Court was misled into thinking that "The phrase 'or Territory' was added, without explanation, in the 1874 codification and revision of the Statutes at Large" (slip op., p. 7, n. 11).

III. THE DISTRICT'S TERRITORIAL STATUS AT THE TIME THE WORDS "OR TERRITORY" WERE ADDED FURNISHES FURTHER SUPPORT FOR THE DISTRICT'S INCLUSION IN §1983.

In appellee's post-argument memorandum, it was pointed out that as of February 21, 1871 the District of Columbia possessed all of the essential attributes of a "Territory" and that several members of Congress referred to that Act as creating a territorial government for the District of Columbia.[12] Appellees believe that the several characterizations in the Congressional Globe of the Act of February 21, 1871 as creating a "territorial" government for the District of Columbia, together with the terms of the Act itself, indicate rather clearly that the Congress of 1871 intended to constitute and did in fact constitute the District a "Territory" by the said Act, which status still existed in 1872 when the words "or Territory" were added to what is now §1983.

The addition of the words "or Territory" in the 1872 revision leads inescapably to the conclusion that the District of Columbia was intended to be included, since the District was in law and in fact a "Territory" from February 21, 1871 until June 20, 1874.

In its opinion, the Court rejects the inference of intended inclusion of the District in §1983 on the ground that the District ceased to have a territorial government on the day the words "or Territory" were formally added to the statute (slip op., p. 12, n. 25). This conclusion distorts the relevant legislative history.

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[12] Supplemental Memorandum, pp. 1-3

As has been pointed out, the words "or Territory" were first added to the revised statute in 1872 in the draft of the revisory commission published in that year (Vol. I, p. 947, Title XXVI, §3). The Act of June 20, 1874, c. 337, 18 Stat. pt. 3, 116, which abolished the territorial government for the District of Columbia was first reported to the House on June 16, 1874, as HR3680, and in the space of four days was passed by the House (June 17), passed by the Senate (June 18) and approved by the President (June 20). "Learned in the law" as the commissioners may have been, it requires an undue attribution of prescience to assume that the revisory commission in 1872 could have anticipated that the District's territorial status would be changed some two years later.[13]

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[13] On the contrary, any such inference was expressly negated by the statement of Rep. Poland, Chairman of the Commission on Revision of the Laws, in introducing the revised laws to the Congress: "I understand that we are proceeding upon an entire ignoring of anything that may be done during this session in the way of making laws. We are endeavoring to ascertain and set down what was the law at the beginning of this session, as if no Congress was ever to meet again and no new law to be passed." Cong. Globe, 43rd Cong., 1st Sess., January 21, 1874, p. 825.

IV. CONGRESS INTENDED ARTICLE III COURTS TO BE AVAILABLE TO PROTECT CONSTITUTIONAL RIGHTS IN THE NATION'S CAPITAL.

As this Court recognized in its opinion, it was of great concern to Congress to assure that Article III courts, in which judges are protected by life tenure, were available throughout the United States to protect constitutional rights (Slip op., note 28). Surely Congress knew that the court system of the District of Columbia, then an Article III system, could be changed by legislation. It seems unlikely that Congress, intent upon protecting Constitutional rights in all places in the United States, including the territories, would have excluded the District of Columbia. Such an oversight would mean that, today, the District of Columbia – the seat of the national government – would be the only jurisdiction in the United States in which citizens could not rely upon judges with life tenure for the protection of constitutional rights.[14]

Clearly, judges of the local court system in the District of Columbia are "peculiarly susceptible to . . . pressures, since their appointments . . . [are]dependent upon favorable recommendations" (Slip op., note 28) by the Department of Justice.[15] In May 1971, the District

[14] The problem is not resolved by federal question jurisdiction, under 28 U.S.C. Section 1331, where more than $10,000 is in controversy. The existence of 42 U.S.C., Section 1983 has dispensed with the necessity for the courts to deal with the monetary value to be placed on such non-economic constitutional rights as freedom of speech and assembly, and freedom from police misconduct.

[15] Judges of the Superior Court of the District of Columbia are appointed for 15 year terms by the President (D.C. Code, Sections 11-1501, 11-1502).

of Columbia Police Department arrested 13,000 persons in a single week, yet only a handful were subsequently convicted of any offense.[16] The City prosecutor, reportedly under pressure from the Department of Justice to obtain convictions,[17] complained to the Justice Department that the local judges were dismissing too many of these cases. The problem of attempting such blatant pressure against term judges was implicitly recognized by the Chief Judge of the local court when he expressed concern at the Corporation Counsel's actions.[18]

The inherently compromising pressures of the power of reappointment are further buttressed by a Commission on Judicial Disabilities and Tenure, empowered to remove

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16 See The Washington Post, May 27, 1971, p. A-1; *May Day 1971: Order Without Law, An ACLU Study of the Largest Sweep Arrests in American History* (July 1972). On May 26, 1971, the United States Court of Appeals for the District of Columbia Circuit issued a temporary restraining order enjoining further prosecution of "any cases . . . in which appellees do not reasonably believe that they have in their files and records adequate evidence to support probable cause . . ." *Sullivan v. Murphy*, D.C. Cir. No. 71-1395, Order of May 26, 1971. This order resulted in the dropping of charges in the few thousand remaining cases. The Washington Post, May 27, 1971, p. A-1; October 2, 1971, p. A-1.

17 The Washington Daily News, May 19, 1971, p. 3. The President and the Justice Department both praised the police actions and vowed that similar measures would be taken against future demonstrations, if deemed necessary. The Washington Post, June 2, 1971, p. A-1; May 11, 1971, p. A-1.

18 The Washington Post, May 30, 1971, p. A-9.

judges for "any . . . conduct which is prejudicial to the administration of justice . . ." (D.C. Code, Section 11-1526). Three of the five members of this Commission are appointed by the President, and a fourth is appointed by the Mayor of the District of Columbia (who is appointed by the President) (D.C. Code, Section 11-1522). The Commission has publicly warned that it is maintaining close surveillance on the Superior Court judges.[19]

The safeguards of Article III are designed, in large part, "for the benefit of the whole people." *O'Donoghue v. United States,* 289 U.S. 516, 532-34 (1933). These safeguards, this Court has said, "promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution . . ." *Evans v. Gore,* 253 U.S. 245, 253 (1920). The people of the District of Columbia are entitled to "all the rights, guaranties, and immunities of the Constitution, among which . . . [is] the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Article III." *O'Donoghue v. United States, supra,* 289 U.S. at 540.

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[19] The Washington Post, November 4, 1971, p. B-1.

CONCLUSION

The legislative history outlined in the foregoing sections, and the long and deeply recognized necessity of judicial independence, compel the conclusion that Congress never intended to exclude the District of Columbia from the protection which Article III courts extend in all other parts of the United States. Accordingly, and particularly in light of the newly-discovered legislative history set forth above, the respondent asks for a rehearing on the question of the District's inclusion in what is now 42 U.S.C. §1983.

Respectfully submitted,

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APPENDIX A

No. 2.

May 3, 1871. BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Attention of the people called to the act, 1871, ch. 22, post, p. 22.

THE act of Congress, entitled "An act to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes," approved April 20, A. D 1871, being a law of extraordinary public importance, I consider it my duty to issue this my proclamation calling the attention of the people of the United States thereto; enjoining upon all good citizens and especially upon all public officers, to be zealous in the enforcement thereof, and warning all persons to abstain from committing any of the acts thereby prohibited.

Law to be enforced everywhere.

This law of Congress applies to all parts of the United States, and will be enforced everywhere, to the extent of the powers vested in the Executive. But inasmuch as the necessity therefor is well known to have been caused chiefly by persistent violations of the rights of citizens of the United States, by combinations of lawless and disaffected persons in certain localities lately the theatre of insurrection and military conflict, I do particularly exhort the people of those parts of the country to suppress all such combinations by their own voluntary efforts through the agency of local laws, and to maintain the rights of all citizens of the United States, and to secure to all such citizens the equal protection of the laws.

People in certain localities particularly exhorted to suppress illegal combinations, &c.

Fully sensible of the responsibility imposed upon the Executive by the act of Congress to which public attention is now called, and reluctant to call it exercise any of the extraordinary powers thereby conferred upon me, except in cases of imperative necessity, I do, nevertheless, deem it my duty to make known that I will not hesitate to exhaust the powers thus vested in the Executive, whenever and wherever it shall become necessary to do so for the purpose of securing to all citizens of the United States the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws.

The Executive power to be fully used in return to all citizens their constitutional legal rights.

It is my earnest wish that peace and cheerful obedience to law may prevail throughout the land, and that all traces of our late unhappy civil strife may be speedily removed. These ends can be easily reached by acquiescence in the results of the conflict, now written in our Constitution, and by the due and proper enforcement of equal, just, and impartial laws in every part of our country.

How peace and cheerful obedience to law may be made to prevail, &c.

The failure of local communities to furnish such means for the attainment of results so earnestly desired imposes upon the National Government the duty of putting forth all its energies for the protection of its citizens of every race and color, and for the restoration of peace and order throughout the entire country.

The National Government to protect citizens and restore peace and order where local governments fail, &c.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this third day of May, in the year [SEAL.] of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-fifth.

U. S. GRANT.

By the President:

HAMILTON FISH, *Secretary of State.*